Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

DIANA DUNCAN,

Petitioner,

v.

GENERAL MOTORS CORPORATION,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In reviewing a post-trial motion for judgment as a matter of law in a sexual harassment case where the trier of fact is to consider all of the circumstances, did the court of appeals err in usurping the role of the jury when it supplanted the jury's finding of fact that Ms. Duncan had been subjected to a hostile work environment with its own finding of fact that she had not?

PARTIES TO PROCEEDINGS

Petitioner:

Ms. Diana Duncan

Respondent:

General Motors Corporation

TABLE OF CONTENTS

QUESTION PRESENTED.....i

PARTIES TO PROCEEDINGS ii

TABLE OF CONTENTS.....iii

TABLE OF AUTHORITIES v

OPINIONS BELOW.....1

STATEMENT OF JURISDICTION.....1

STATUTORY PROVISIONS INVOLVED.....2

STATEMENT OF THE CASE.....3

REASONS FOR GRANTING THE PETITION

1. The Eighth Circuit's Decision Conflicts With The Court's Authority, As Well As Authority Of Other Circuits.....8

2. The Circuits Vary Considerably on What Kind of Behavior Constitutes A Hostile Work Environment.....13

3. The Petition Raises Vitally Important Issues Regarding The Sanctity Of The Jury System In Title VII Cases, As Provided By The Civil Rights Act of 1991.....16

CONCLUSION.....19

APPENDIX

1. Eighth Circuit Opinion (August 22, 2002).....1a

2. District Court Order Denying Employer's Post-Trial Motion for Judgment as A Matter of Law (July 25, 2000).....18a

3. District Court Order Denying Employer's Motion for Summary Judgment (November 15, 1999).....23a

4. Eighth Circuit Order Denying En Banc Review (November 15, 2002).....33a

TABLE OF AUTHORITIES

Adusumilli v. City of Chicago,
164 F.3d 353 (7th Cir. 1998).....15

Alfano v. Costello,
294 F.3d 365 (2d Cir. 2002).....17

Anderson v. City of Bessemer City,
470 U.S. 564 (1984).....8,9,10

Baskerville v. Culligan Int'l. Co.,
50 F.3d 428 (7th Cir. 1995).....12,14,17

Black v. Zaring Homes, Inc.,
104 F.3d 822 (6th Cir. 1997).....12,13,17

Brill v. Lante Corp.,
119 F.3d 1266 (7th Cir. 1997).....14

Clark County Sch. Dist. v. Breeden,
532 U.S. 268 (2001).....10

Connor v. Schrader- Bridgeport Int'l, Inc.,
227 F.3d 179 (4th Cir. 2000).....12

Davis v. United States Postal Serv.,
142 F.3d 1334 (10th Cir. 1998).....14

DeAngelis v. El Paso Mun. Police Officers Assoc.,
51 F.3d 591 (5th Cir. 1996).....17

Fuller v. City of Oakland, California,
47 F.3d 1522 (9th Cir. 1995).....12

Gallagher v. Delaney,
139 F.3d 338 (2d Cir. 1998).....12,15

Galloway v. General Motors Serv. Parts Operations,
78 F.3d 1164 (7th Cir. 1996).....14

Harris v. Forklift Systems, Inc.,
510 U.S. 17 (1993).....8,9,10

Hathaway v. Runyon,
132 F.3d 1214 (8th Cir. 1997).....10

Kimzey v. Wal-mart Stores, Inc,
107 F.3d 568 (8th Cir. 1997).....14

McCowan v. All Star Maint.,
273 F.3d 917 (10th Cir. 2001).....10

Mendoza v. Borden, Inc.,
195 F.3d 1238 (en banc) (11th Cir. 1999),
cert. denied, 529 U.S. 1068 (2000).....12,17

Moring v. Arkansas Dept. of Corr.,
243 F.3d 452 (8th Cir. 2001).....10

Morrison v. Carleton Woolen Mills,
108 F.3d 429 (1st Cir. 1997).....14

Oncale v. Sundowner Offshore Serv., Inc.,
523 U.S. 75 (1998).....8

Pullman-Standard v. Swint,
456 U.S. 273 (1982).....8,9,10

Quantock v. Shared Mktg. Servs, Inc.,
312 F.3d 899 (7th Cir. 2002).....13,15

Reeves v. Sanderson Plumbing Products,
530 U.S. 133 (2000).....9, 10

Rorie v. United Parcel Serv.,
151 F.3d 757 (8th Cir. 1998).....15

Shepard v. Comptroller of Pub. Accounts of the State of Texas, 168 F.3d 871 (5th Cir. 1999),
cert. denied, 528 U.S. 963 (1999).....13

White v. New Hampshire Dept. of Corr.s,
221 F.3d 254 (1st Cir. 2000).....13

CONSTITUTION AND STATUTES

42 U.S.C. § 1981(a)(c).....2, 16

42 U.S.C. § 2000e-2(a)(1).....2

U.S. CONST. amend. VII.....2,16

MISCELLANEOUS

H.R. REP. NO. 102-40 (I), 102d Cong., 1st Sess. 549, *reprinted in 1991 U.S. Code Congressional and Administrative News*.....16

Kevin M. Clermont & Theodore Eisenberg; *Plaintiphobia in Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947 (2002)...17

Theodore Eisenberg & Steven J. Schwab; Eisenberg-Schwab Report; *Double Standard on Appeal: An Empirical Analysis of Employment Discrimination Cases in the U.S. Court of Appeals*, The Employee Advocate, Winter 2001/2002, 84-86.....18

Eric Schnapper; *Some of Them Still Don't Get It: Hostile Work Environment Litigation in the Lower Courts*, 1999 U. Chi. Legal F. 277 (1999).....16, 17

The Petitioner, Ms. Diana Duncan, respectfully petitions for a Writ of Certiorari to review the judgment of the Eighth Circuit Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 300 F.3d 928, and is set out at pp. 1a-17a of the appendix to this petition.

The memorandum decision of the United States District Court for Eastern District of Missouri denying the Employer's Post-trial Motion for Judgment as a Matter of Law is not reported, and is set out at pp. 18a-22a of the appendix to this petition.

The memorandum decision of the United States District Court for Eastern District of Missouri denying the Employer's Motion for Summary Judgment is not reported, and is set out at pp. 23a- 32a of the appendix to this petition.

JURISDICTION

The Eighth Circuit Court of Appeals entered its opinion and order on August 22, 2002. App. 1a-17a. Ms. Duncan filed a timely Petition for Rehearing and Rehearing En Banc. The Court of Appeals denied the petition by a four-to-four split, with three judges abstaining, on November 15, 2002. App. 33a.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254 (1). –

STATUTORY PROVISIONS INVOLVED

Section 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), provides in part:

> (a) It shall be an unlawful employment practice for an employer-
>
> > (1) to fail to refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Section 102 (c) of the 1991 Civil Rights Act, 42 U.S.C. § 1981(a)(c), provides in part:

> (c) Jury Trial—If a complaining party seeks compensatory or punitive damages under this section-
>
> (1) any party may demand a trial by jury.

The Seventh Amendment to the United States Constitution provides:

> In Suits at common law, where the value in the controversy shall exceed twenty dollars, the right by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

U.S. CONST. amend. VII.

STATEMENT OF CASE

Petitioner Diana Duncan worked as a technical training clerk at General Motors Corporation ("GMC") from August 1994 until May 1997.[1] App. 2a. Ms. Duncan first learned about the position at GMC from Mr. James Booth, who frequented the country club where Ms. Duncan was a waitress. *Id.* Mr. Booth asked Ms. Duncan if she knew anyone who might be interested in a training clerk position at GMC. *Id.* Ms. Duncan said that she would be interested. She interviewed for the job and she was hired to work at the GMC plant. App. 3a.

Mr. Booth supervised Ms. Duncan's day-to day work at the plant. App. 3a-4a, 14a. Two weeks after Ms. Duncan began work at GMC, Mr. Booth requested that she come to an off-site meeting at a restaurant. App. 3a. Mr. Booth met Ms. Duncan in the restaurant's bar. *Id.* He told her that he was unhappy in his marriage and in love with someone at work. *Id.* Then he asked Ms. Duncan, whom he knew to be married also, if she would have an affair with him. App. 3a, 14a. She refused his sexual advance and immediately complained to both Mr. Booth and another supervisor at GMC. *Id.*

As noted by the court of appeals' majority, Mr. Booth's attitude toward Ms. Duncan then "became hostile," "he became more critical of her work, and he engaged in "numerous incidents of [] inappropriate behavior" that persisted through the remainder of Ms. Duncan's employment at the GMC plant. App. 3a. In a dissenting

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[1] Although there was a dispute concerning whether GMC was Ms. Duncan's employer, the court of appeals did not reach that issue, and instead dismissed the case because it found that Mr. Booth's behavior did not rise to the level of a hostile work environment. App. 8a, 12a

opinion, Judge Richard S. Arnold noted that Mr. Booth "became hostile to Ms. Duncan, increased his criticism of her work, and degraded her professional capabilities in front of her peers." App. 14a. Judge Arnold also observed: "Significantly, there is no suggestion that this hostile behavior occurred before Ms. Duncan refused his request for sex." *Id.*

The majority opinion recounted some details of Mr. Booth's "numerous incidents of . . . inappropriate behavior." App. 3a. The opinion noted several occasions on which Mr. Booth "would unnecessarily touch [Ms. Duncan's] hand when she handed him the telephone;" two occasions on which he showed Ms. Duncan "a child's pacifier that was shaped like a penis;" and an occasion on which he arranged to have Ms. Duncan "arrested" as part of a charity event, then posted "bail" on her behalf and –despite her protests— drove her to a bar rather than back to the GMC plant. App. 4a, 5a.

The majority opinion also noted that Mr. Booth had a naked woman as his computer screensaver, and further displayed a planter in his office that was shaped like a slouched man wearing a sombrero with a cactus protruding from his pants as a penis. App. 4a. Mr. Booth directed Ms. Duncan to draw the penis planter to demonstrate her artistic abilities (while other co-workers were told to draw automotive parts). *Id.*

In a further attempt to humiliate Ms. Duncan, the majority noted that Mr. Booth created a "recruitment poster" that was hung on a public bulletin board, depicting a caricature of Ms. Duncan as the "President and Chief Executive Officer of the Man Haters Club of America"—an organization that required its women members to "always be in control of 1) Checking, Savings, all loose change, etc; 2)

(ugh) Sex; 3) Raising children our way!; 4) Men must always do household chores; 5) consider T.V. Dinners a gourmet meal." App. 4a, 15a.

In a final act of degradation, Mr. Booth handed Ms. Duncan a handwritten memorandum and demanded that she type it. The memorandum outlined the beliefs of the "He-Men Women Hater's Club," which included the following:

> 1) Constitutional Amendment, the 19th, giving women [the] right to vote should be repealed. Real He- Men indulge in a lifestyle of cursing, using tools, handling guns, driving trucks, hunting and of course, drinking beer.
> 2) Women really do have coodies [sic] and they can spread
> 3) Women is [sic] the cause of 99.9 percent of stress in men.
> 4) Sperm has [sic] a right to live.
> 5) All great chiefs of the world are men.
> 6) Prostitution should be legalized.

App. 5a. Ms. Duncan refused to type Mr. Booth's handwritten memorandum, and submitted her letter of resignation two days later on May 7, 1997. *Id.*

The Court of Appeals majority characterized Mr. Booth's conduct variously as "unwelcome," "inappropriate," "boorish" and "chauvinistic and decidedly immature." App. 3a, 8a, 10a. Its opinion observed that "in many instances the environment that Ms. Duncan endured at GMC was offensive and disrespectful." App. 11a.

Ms. Duncan filed a charge of sex discrimination with the Equal Employment Opportunity Commission on October 30, 1997. The EEOC issued a right to sue letter on April 17,

1998. App. 6a. Ms. Duncan then filed suit against GMC in the Eastern District of Missouri, alleging sexual harassment and constructive discharge under both Title VII and the Missouri Human Rights Act. App. 2a.

On November 15, 1999, the district court denied GMC's motion for summary judgment, and the case proceeded to trial. App. 23a-32a. The jury returned a verdict in favor of Ms. Duncan on both counts, awarding her $ 700,000 in emotional distress damages on the sexual harassment claim, and $ 300,000 in emotional distress damages on the constructive discharge claim. App. 2a. GMC then filed a post-trial motion for judgment as a matter of law, or alternative, for a new trial. The district court denied the motion, and GMC appealed to the Eighth Circuit Court of Appeals. App. 18a-22a.

On August 22, 2002, the court of appeals, with Judge Arnold dissenting, reversed the decision of the district court denying GMC judgment as "a matter of law." In dismissing Ms. Duncan's sexual harassment claim, the majority found, "we agree [] that the alleged harassment was not so severe or pervasive" so as to constitute a hostile work environment. App. 8a.

In his dissenting opinion, Judge Arnold wrote that the "[jury's] determination was reasonable and supported by ample evidence." App. 14a. Specifically, the dissent recognized that "a jury could easily draw the inference that Mr. Booth changed his attitude about Ms. Duncan's work because she rejected his sexual advance" and further noted that "a jury could reasonably conclude that Ms. Duncan felt particularly humiliated and degraded by Mr. Booth's behavior because she alone was singled out for this harassment." App. 14a, 16a.

Timely petitions for rehearing en banc and rehearing were filed. On November 15, 2002, in a four-to-four split, the Eighth Circuit denied the petition for rehearing en banc. App. 33a.

REASONS FOR GRANTING THE PETITION

The Eighth Circuit Court of Appeals eliminated the fact-finding role of the jury when it made a judicial determination of fact in deciding that Ms. Duncan was not subjected to a hostile work environment. This decision conflicts with authority of the Court, as well as decisions from other circuits. This case raises vitally important issues regarding the sanctity of jury determinations; the proper role of an appellate court in cases in which the fact-finding function is committed to the jury; and the legal standards for determining the factual question of whether sexual harassment has occurred within the contemplation of Title VII of the Civil Rights Act of 1964, and the Civil Rights Act of 1991.

This conflict is particularly compelling because the applicable legal standard as articulated by the Court requires the fact-finder to consider the totality of the circumstances in making this determination. Insisting that juries and judges adhere to their proper roles is necessary if individuals with meritorious claims are to have a proper opportunity to prove those claims and secure relief. Finally, the Court has an interest in ensuring that the intent of Congress in providing jury trials to Title VII plaintiffs through the passage of the Civil Rights Act of 1991 is respected.

1. The Eighth Circuit's Decision Conflicts With The Court's Authority, As Well As Authority Of Other Circuits.

The court of appeals' decision, enabling reviewing courts to make judicial determinations of fact regarding whether one is subjected to a hostile work environment, conflicts with the Court's authority. In *Pullman-Standard v. Swint,* the Court held that the determination of "intentional discrimination" is a "pure question of fact . . . [i]t is not a question of law and not a mixed question of law and fact." 456 U.S. 273, 287-88 (1982). Further, in *Anderson v. City of Bessemer City*, the Court reiterated that "a finding of intentional discrimination is a finding of fact."[2] 470 U.S. 564, 573 (1984).

In a sexual harassment case, the ultimate issue of fact is whether "members of one sex are exposed to disadvantageous terms or conditions of employment to which member of the other sex are not exposed." *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 78-79 (1998) (*quoting Harris*, 510 U.S. at 25 (Ginsburg, J. concurring)). A subsidiary fact issue is whether the conduct was subjectively and objectively severe or pervasive enough to rise to the level of a hostile work environment. This determination—whether a hostile work environment exists—is a question of fact that is reserved for the jury, rather than the reviewing courts.[3] Indeed, in *Harris v. Forklift Systems,*

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[2] As the Court observed in *Anderson*, "the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the [fact-finder] that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much." 470 U.S. at 575.

[3] In recognizing that intentional discrimination is a question of fact in *Pullman* and *Anderson*, the Court held that the courts of appeal were

Inc., Justice Scalia in his concurring opinion recognized that because Congress set no clear standards in defining a hostile work environment, it is to be left to "virtually unguided *juries* [to] decide whether sex-related conduct engaged in (or permitted by) an employer is egregious enough to warrant an award of damages." 510 U.S. 17, 24 (1993). While expressing concern regarding the "certitude" of the standard set forth in *Harris*, Justice Scalia nevertheless opined, "I know of no alternative to the course the Court [] has taken" that would "provide greater guidance to *juries* and employers." *Id.* (emphasis added).

Because the issue of whether conduct is severe or pervasive enough to constitute a hostile work environment is a pure fact question, the appropriate standard of review of a trial judge's denial of a post-trial motion for judgment as a matter of law is whether--drawing all reasonable inferences in favor of a non-moving party and not making credibility determination or weighing the evidence-- a reasonable fact-finder could have found as the jury did. *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133, 150-151 (2000). The Court recently reiterated this deferential standard of review when it rejected an employee's sexual harassment claim,

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limited to review under the clearly erroneous standard pursuant to Rule 52 (a) of the Federal Rules of Civil Procedure in reviewing the district court's factual finding. Because Congress amended Title VII to allow for jury trials when it enacted the Civil Rights Act of 1991, those factual findings are now left for the jury in cases where a plaintiff seeks compensatory or punitive damages, rather than the district court. The legal principle espoused in *Pullman* and *Anderson* --that the question of intentional discrimination is a pure question of fact- is still equally applicable today. The only difference today is that such factual determinations of intentional discrimination are now in the hands of the jury if a party so requests, rather than the district court judges. Here, of course, the appellate court was reviewing the trial judge's refusal to set aside a jury verdict.

finding that "no reasonable person could have believed that the single incident [] violated Title VII's standard." *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 271 (2001).

The Court in *Harris* determined that the factual determination of what constitutes a hostile work environment depends upon the perception of "all of the circumstances."[4] 510 U.S. at 23. The jury is in the best position to make this inherently factual determination because it is only the jury who sees the totality of the circumstances—the jury hears all the evidence of the case, weighs the credibility of the witnesses, and then draws all reasonable inferences from the facts presented at trial—something the Court has reminded the reviewing appellate courts that they are unable to do.[5]

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[4] As outlined in *Harris*, in determining whether conduct is "severe or pervasive" enough to alter the conditions of employment, one must look at "all of the circumstances," including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*, 510 U.S. at 23. Significantly, although the perpetrator in *Harris* had never touched the plaintiff, seriously propositioned her, or used vulgar language, the Court remanded back to the lower court for a determination on whether there was harassment. By contrast, the panel here overturned the jury verdict notwithstanding the fact that the perpetrator sexually propositioned the plaintiff, physically touched her on several occasions, and repeatedly displayed blatantly sexual objects to the plaintiff.

[5] There can be no doubt that the Eighth Circuit improperly weighed the evidence and the credibility of the witnesses. In particular, after a lengthy recitation of the facts in this case, the Court characterized defendant's "numerous incidents of [] inappropriate behavior" as "chauvinistic," "immature," "offensive," "disrespectful," "disagreeable" and "boorish." App. 3a, 8a-10a. Moreover, and perhaps most significantly, the Eighth Circuit found that "Duncan was upset and embarrassed," as well as "disturbed" by the Defendant's behavior. App. 9a. The panel's observation of the Plaintiff's emotional state, however, could not have been made without an examination and evaluation of the evidence, as well as an examination of the Plaintiff's credibility.

Reeves, 530 U.S. at 150-151 (reiterating that in employment discrimination cases "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge"). Thus, the panel's decision, which obviates the role of the jury as the trier of fact, and substitutes the majority's determination that Defendant's conduct was not severe or pervasive "as a matter of law," conflicts with the Court's decisions in *Anderson* and *Pullman*, as well as the Court's guidance in *Harris*.[6] App. 9a, 11a.

The Eighth Circuit's decision also conflicts with other circuits that have recognized that the issue of whether behavior is severe or pervasive to constitute a hostile work environment is a question of fact necessarily reserved for the jury, not the judges.[7] *See McCowan v. All Star Maint.*, 273

Obviously, the findings made by two judges are contrary to what the jury found—that the conduct was objectively and subjectively severe enough to alter the terms and condition of Ms. Duncan's employment.

[6] The Eighth Circuit majority articulates its resolution of the critical factual inquiry as follows: "*We agree* [] with GMC's assertion that the alleged harassment was not so severe or pervasive"; "Booth's actions were boorish, chauvinistic and decidedly immature, but *we cannot say* [that the supervisor's action] created an objectively hostile work environment claim" App. 8a, 10a.

[7] Indeed, the panel's decision ignores the Eighth Circuit's own precedent on this point. *See Hathaway v. Runyon*, 132 F.3d 1214, 1221 (8th Cir. 1997) (recognizing that "in conducting its *fact-based* inquiry into the severity and pervasiveness of the conduct and into whether it was based on sex, *the jury* looks at all the circumstances supported by credible evidence"); *Moring v. Arkansas Dept. of Corr.*, 243 F.3d 452, 456 (8th Cir. 2001) (holding that "whether a work environment is objectively hostile or abusive is a *fact-intensive* inquiry"). While the dissent relies heavily on *Hathaway*, the majority fails to even acknowledge the decision. App. 6a-17a.

F.3d 917, 923 (10th Cir. 2001) (acknowledging that "the severity and pervasiveness evaluation is particularly unsuited for summary judgment because it is *quintessentially a question of fact*"); *Connor v. Schrader- Bridgeport In'l, Inc.*, 227 F.3d 179, 199-200 (4th Cir. 2000) (holding that "whether harassment [i]s sufficiently severe or pervasive to create a hostile work environment is *'quintessentially a question of fact' for the jury*"); *Gallagher v. Delaney*, 139 F.3d 338, 342 (2d Cir. 1998) (recognizing that "while gender relations in the workplace are rapidly evolving, and views of what is appropriate behavior are diverse and shifting, *a jury made of a cross-section of our heterogeneous communities* provides the appropriate institution for deciding whether borderline situations should be characterized as sexual harassment") (emphasis added).

As discussed, while some circuits correctly recognize the issue to be a question of fact, they nevertheless take it upon themselves, as judges, to determine whether harassment exists. *See Black v. Zaring Homes, Inc.*, 104 F.3d 822, 826 (6th Cir. 1997) (reviewing "the totality of the circumstances, *we find* that . . . the conduct does not appear to have been more than 'mere offensive'"); *Baskerville v. Culligan Int'l. Co*, 50 F.3d 428, 431 (7th Cir. 1995) (insists that whether a given set of circumstances rises to the level of a hostile work environment is often so clear to be within the province of a judge, but indicates that in a close case the decision should be left to the jury).

Further, some circuits have even held that whether behavior is actionable harassment is a question of law for the courts to determine. *See Fuller v. City of Oakland, California*, 47 F.3d 1522, 1527 (9th Cir. 1995) (holding that "whether the conduct was sufficiently severe or pervasive to constitute sexual harassment is a question of law"); *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1248 (11th Cir. 1999) (en

banc), *cert. denied*, 529 U.S. 1068 (2000) (majority of judges holding "*[w]e conclude* that the conduct established by Mendoza was not sufficiently severe or pervasive to alter Medoza'a terms or condition of employment").

2. The Circuits Vary Considerably On What Kind Of Behavior Constitutes A Hostile Work Environment.

The tendency of the courts of appeal to re-determine the central factual issue in Title VII sexual harassment cases might be less problematic if those courts were creating a principled and distinct body of precedent; but, there is a distinct split in the circuits with respect to both the articulation of a standard for identifying hostile work environments, and the application of that standard. *Compare Quantock v. Shared Mktg. Servs, Inc.*, 312 F.3d 899 (7th Cir. 2002) (finding that three propositions for sex, including "oral sex," a "threesome" and "phone sex" were sufficient to create a triable issue of fact on whether plaintiff was subjected to a hostile work environment); *White v. New Hampshire Dept. of Corrections*, 221 F.3d 254 (1st Cir. 2000) (finding that "disgusting comments" and conversations that occurred "everyday" were sufficient to uphold a $ 45,000 jury verdict for plaintiff on her sexual harassment claim) *with Shepard v. Comptroller of Public Accounts of the State of Texas*, 168 F.3d 871 (5th Cir. 1999), *cert. denied*, 528 U.S. 963 (1999) (finding that comments such as "your elbows are the same size as your nipples," and "you have big thighs," touching plaintiff's arms, and attempts to look down the plaintiff's dress were insufficient to constitute sexual harassment); *Black v. Zaring Homes, Inc.*, 104 F.3d 822 (6th Cir. 1997) (finding insufficiently severe or pervasive conduct, where conduct over a four-month period involved repeated sexual jokes; one occasion of looking plaintiff up and down, smiling and stating, there's

"nothing I like more in the morning than sticky buns"; suggesting that land area be named "Titsville" or "Twin Peak" ; asking plaintiff, "Say, weren't you there [at a biker bar] Saturday night dancing on the tables?"; and stating "Just get the broad to sign it; and telling plaintiff she was "paid great money for a woman").

Some circuits treat the same type of conduct differently from one case to another. *Compare Baskerville v. Sullivan Int'l Co.*, 50 F.3d 428, 430 (7th Cir. 1995) (gesture indicating masturbation insufficient to support sexual harassment claim) *with Davis v. Unites States Postal Serv.*, 142 F.3d 1334, 1337 (10th Cir. 1998) (evidence that perpetrator made a "sexually obscene gesture" at plaintiff supported harassment claim); *compare Brill v. Lante Corp.* 119 F.3d 1266, 1274 (7th Cir. 1997) (finding that "yelling at plaintiff while 'towering' over her" insufficient to support a sexual harassment claim) *with Morrison v. Carleton Woolen Mills*, 108 F.3d 429, 434 (1st Cir. 1997) (finding that regular screaming at female employees, "but not at men" contributed to a hostile work environment"); *compare Galloway v. General Motors Serv. Parts Operations*, 78 F.3d 1164, 1168 (7th Cir. 1996) (finding incessant use of the epithet "sick bitch" not sufficient without more to support sexual harassment claim) *with Morrison*, 108 F.3d at 434 (finding use of the term "bitch" does support sexual harassment claim), *and Kimzey v. Wal-mart Stores, Inc*, 107 F.3d 568, 571 (8th Cir. 1997) (same); *compare Hartsell*, 123 F.3d at 769, 773 (holding that kicking and shoving plaintiff's chair were too trivial to support a harassment claim), *with Kimzey* 107 F.3d at 573 (evidence that harasser kicked legs of female employees and shook ladder on which plaintiff was standing would support a harassment claim).

Indeed, panels within a circuit, including the Eighth Circuit, strongly vary on what level of behavior constitutes a

hostile work environment. *Compare Duncan v. General Motors, Corp.*, 300 F.3d 928 (8th Cir. 2002), *with Rorie v. United Parcel Service*, 151 F.3d 757, 762 (8th Cir. 1998) (concluding that a "supervisor who pats a female employee on the back, brushes up against her, and tells her she smells good" could be found by a jury to be a hostile work environment); *Compare Quantock v. Shared Mktg. Servs, Inc.*, 312 F.3d 899 (7th Cir 2002) (finding that three propositions for sex, including "oral sex," a "threesome" and "phone sex" was sufficient to create a triable issue of fact on whether plaintiff was subjected to a hostile work environment) *with Adusumilli v. City of Chicago*, 164 F.3d 353, 357 (7th Cir. 1998) (finding actions insufficient to support hostile work environment where co-employees teased plaintiff, made sexual jokes aimed at her, asking her what "putting one rubber band on top and another on the bottom means," commented about her low neck lines, repeatedly stared at her breasts and attempted to make eye contact, and four incidents of touching her arm, fingers or buttocks).

Perhaps juries nationwide are no more consistent in their case-to-case determinations than the several courts of appeal, but as discussed, it is the role of the jury to make such factual determinations. Indeed, juries, properly instructed, are uniquely suited to the finding of workplace facts and the apprehension of the real-world significance of those facts. *See Gallagher, supra*, 139 F.2d at 243 (observing that "[w]hatever the early life of a federal judge, she or he usually lives in a narrow segment of the enormously broad American socio-economic spectrum, generally lacking the current real-life experience required in interpreting subtle sexual dynamics of the workplace based on nuances, subtle perceptions, and implicit communications"). Further, juries in these cases are not creating an inconsistent and confused body of judicial precedent. Ms. Duncan and other plaintiffs

who prosecute claims of sexual harassment see their verdicts accorded vastly different and singularly unpredictable treatment on appeal, depending upon the circuits in which those cases arise, or the panels of judges to whom the cases are assigned within a circuit. That wild kind of inconsistency in the fate of hostile work environment judgments should be addressed by the Court. *See* Eric Schnapper; *Some of Them Still Don't Get It: Hostile Work Environment Litigation in the Lower Courts*, 1999 U. Chi. Legal F. 277, 312-315 (1999).

3. The Petition Raises Vitally Important Issues Regarding The Sanctity Of The Jury System In Title VII Cases, As Provided By The Civil Rights Act of 1991.

The Seventh Amendment provides, "the right to a trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in a Court of the United States, than according to the rules of Common Law." U.S. CONST. amend. VII. In the Civil Rights Act of 1991, Congress explicitly provided for a trial by jury in Title VII cases where a plaintiff seeks compensatory or punitive damages. 42 U.S.C. § 1981(a)(c)(1). In providing for a right to a jury, Congress recognized that "[t]he jury system is the cornerstone of our system of civil justice, as evidenced by the Seventh Amendment's guarantee." H.R. REP. NO. 102-40 (I), 102d Cong., 1st Sess. 549, *reprinted in 1991 U.S. Code Congressional and Administrative News*, 610. Congress went on to recognize that "[j]ust as they have for hundreds of years, juries are fully capable of determining whether an award of damages is appropriate and if so, how large it must be to compensate the plaintiff adequately and to deter future repetition of the prohibited conduct." *Id.*

This right to a trial by jury is swept aside when an appellate court replaces a correctly instructed jury's finding

of sexual harassment. *See Alfano v. Costello*, 294 F.3d 365 (2d Cir. 2002) (reversing a $150,000 jury verdict on plaintiff' sexual harassment claim finding that behavior was not severe or pervasive); *Black*, 104 F.3d at 823 (reversing a jury verdict of $50,000 for compensatory damages and $200,000 in punitive damages on Plaintiff sexual harassment case); *DeAngelis v. El Paso Municipal Police Officers Assoc.*, 51 F.3d 591, 596 (5th Cir. 1996) (reversing a $60,000 jury verdict finding that there was no hostility as a matter of law); *Baskerville.*, 50 F.3d at 430 (reversing a $25,000 jury verdict on Plaintiff sexual harassment claim because it was not severe or pervasive); *Mendoza v. Borden, Inc.*, 195 F.3d 1238 (11th Cir. 1999) (en banc), *cert. denied*, 529 U.S. 1068 (2000) (affirming the district court's grant of judgment as a matter of law after the case already went to a jury);[8] *see also* Schnapper, *Hostile Work Environment Litigation*, *supra*, 302-307 (discussing the appellate courts' practice of usurping the fact-finding role of the juries).

Some commentators have conducted an empirical analysis of appellate court behavior and have concluded that defendants have "a substantial advantage over plaintiffs on appeal," especially in civil rights litigation. *See* Kevin M. Clermont and Theodore Eisenberg; *Plaintiphobia in Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*; 2002 U. ILL. L. REV. 947 (2002). Of all the civil rights employment cases in which appellate courts review a defendant's trial victory, reversal occurs with a frequency of six percent. *Id.* at 957 -958. By sharp contrast, appellate courts reverse forty-four percent of plaintiffs' victories at trial. *Id.* As the commentators aptly

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[8] Importantly, Judge Barkett in a separate dissent objected to the majority opinion because "[t]he mistrust of juries evidenced by the majority is at odds with the specific directive of Congress that the jury is to decide whether gender discrimination has occurred in the workplace." 195 F.3d at 1278.

observe, "the dramatic gap in the reversal rate in employment discrimination cases is a nationwide phenomenon," and that such a "gap raises the specter that appellate courts have a double standard for employment discrimination cases, harshly scrutinizing employee victories at trial while gazing benignly at employer victories at trial." Theodore Eisenberg and Steven J. Schwab; Eisenberg-Schwab Report; *Double Standard on Appeal: an Empirical Analysis of Employment Discrimination cases in the U.S. Court of Appeals,* The Employee Advocate, Winter 2001/2002, 84-86. By granting certiorari, the Court can correct this unfavorable perception by reiterating that jury verdicts in Title VII cases indeed mean something, and declare that a consistent deferential review standard applies in cases where juries, not judges, are charged to consider and arrive at factual findings from the totality of the circumstances.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 00-3544/02-1411

Diana Duncan,	*	
	*	
Appellee,	*	
	*	Appeal from the United
	*	StatesDistrict Court for
v.	*	the Eastern District of
	*	Missouri.
General Motors Corporation,	*	
	*	
Appellant.	*	

Submitted: January 17, 2002
Filed: August 22, 2002

Before WOLLMAN,[1] Chief Judge, RICHARD S. ARNOLD and HANSEN, Circuit Judges.

HANSEN, Circuit Judge.

The Junior College District of St. Louis (the College) arranged for Diana Duncan to provide in-house technical training at General Motors Corporation's (GMC) manufacturing facility in Wentzville, Missouri. Throughout

[1] Honorable Roger L. Woliman stepped down as Chief Judge of the United States Court of Appeals for the Eighth Circuit at the close of business on January 31, 2002. He has been succeeded by the author of this opinion.

her tenure at GMC, Duncan was subjected to unwelcome attention by a GMC employee, James Booth, which culminated in Duncan's resignation. Duncan subsequently filed this suit under Title VII of the Civil Rights Act and the Missouri Human Rights Act, *see* 42 U.S.C. §§ 2000e-2000e-17; Mo. Rev. Stat. § 213.010-213.137,[2] alleging that she was sexually harassed and constructively discharged. A jury found in favor of Duncan and awarded her $4600 in back pay, $700,000 in emotional distress damages on her sexual harassment claim, and $300,000 in emotional distress damages on her constructive discharge claim. GMC appeals from the district court's denial of its posttrial motion for judgment as a matter of law, and the district court's award of attorneys' fees attendant to the posttrial motion. We reverse.

I.

Diana Duncan worked as a technical training clerk in the high-tech area at GMC as part of the College's Center for Business, Industry, and Labor program from August 1994 until May 1997. Duncan provided in-house training support to GMC employees.

Duncan first learned about the College's position at GMC from Booth, a United Auto Workers Union technology training coordinator for GMC. Booth frequented the country club where Duncan worked as a waitress and a bartender. Booth asked Duncan if she knew anyone who had computer and typing skills and who might be interested in a position at

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[2] We analyze Duncan's claims under Title VII and the Missouri Human Rights Acts using the same legal principles. *See Gipson v. KAS Snacktime Co.*, 171 F.3d 574, 578(8th Cir. 1999); *Swyers v. Thermal Science, Inc.*, 887 S.W.2d 655, 656 (Mo. Ct. App. 1994).

GMC. Duncan expressed interest in the job. Booth brought the preemployment forms to Duncan at the country club, and he forwarded her completed forms to Jerry Reese, the manager of operations, manufacturing, and training for the College. Reese arranged to interview Duncan at GMC. Reese, Booth, and Ed Ish, who was Booth's management counterpart in the high-tech area of the GMC plant, participated in the interview. Duncan began work at GMC in August 1994.

Two weeks after Duncan began working at GMC, Booth requested an off-site meeting with her at a local restaurant. Booth explained to Duncan that he was in love with a married coworker and that his own marriage was troubled. Booth then propositioned Duncan by asking her if she would have a relationship with him. Duncan rebuffed his advance and left the restaurant. The next day Duncan mentioned the incident to the paint department supervisor Joe Rolen, who had no authority over Booth. Duncan did not report Booth's conduct to either Reese (her supervisor) at the College or Ish (Booth's management counterpart) at GMC. However, she did confront Booth, and he apologized for his behavior. He made no further such "propositions." Duncan stated that Booth's manner toward her after she declined his advance became hostile, and he became more critical of her work. For example, whenever she made a typographical error, he told her that she was incompetent and that he should hire a "Kelly Services" person to replace her. Duncan admitted that Booth's criticisms were often directed at other employees as well, including male coworkers.

Duncan testified to numerous incidents of Booth's inappropriate behavior. Booth directed Duncan to create a training document for him on his computer because it was the only computer with the necessary software. The screen saver that Booth had selected to use on his computer was a

picture of a naked woman. Duncan testified to four or five occasions when Booth would unnecessarily touch her hand when she handed him the telephone. In addition, Booth had a planter in his office that was shaped like a slouched man wearing a sombrero. The planter had a hole in the front of the man's pants that allowed for a cactus to protrude. The planter was in plain view to anyone entering Booth's office. Booth also kept a child's pacifier that was shaped like a penis in his office that he occasionally showed to his coworkers and specifically to Duncan on two occasions.

In 1995, Duncan requested a pay increase and told Booth that she would like to be considered for an illustrator's position. Booth said that she would have to prove her artistic ability by drawing his planter. Duncan objected, particularly because previous applicants for the position were required to draw automotive parts and not his planter. Ultimately, Duncan learned that she was not qualified for the position because she did not possess a college degree.

Additionally in 1995, Booth and a College employee created a "recruitment" poster that was posted on a bulletin board in the high-tech area. The poster portrayed Duncan as the president and CEO of the Man Hater's Club of America. It listed the club's membership qualifications as: "Must always be in control of: (1) Checking, Savings, all loose change, etc.; (2) (Ugh) Sex; (3) Raising children our way!; (4) Men must always do household chores; (5) Consider T.V. Dinners a gourmet meal." (Appellant's App. at 99.) In April 1996, Booth and a College employee arranged to have Duncan "arrested" at GMC as part of a charity event. A fellow employee explained the event to Duncan, and Duncan left willingly with the "police officer." Booth's financial donation to the charity secured Duncan's "release." Instead

of escorting Duncan back to GMC, and despite her protestations, Booth took Duncan to a bar.

On May 5, 1997, Booth asked Duncan to type a draft of the beliefs of the "He- Men Women Hater's Club." The beliefs included the following:

- Constitutional Amendment, the 19th, giving women [the] right to vote should be repealed. Real He-Men indulge in a lifestyle of cursing, using tools, handling guns, driving trucks, hunting and of course, drinking beer.
- Women really do have coodies [sic] and they can spread.
- Women [are] the cause of 99.9 per cent of stress in men.
- Sperm has a right to live.
- All great chiefs of the world are men.
- Prostitution should be legalized.

(Appellant's App. at 95-96.) Duncan refused to type the beliefs and resigned two days later.

Duncan testified that she complained to anyone who would listen to her about Booth's behavior, beginning with paint department supervisor Joe Rolen after Booth propositioned her in 1994. Duncan testified that between 1994 and 1997 she complained several times to Reese at the College about Booth's behavior, which would improve at least in the short term after she spoke with Reese. During that same time period, Duncan met twice with an attorney to discuss her treatment by Booth. Duncan reported Booth's alleged harassment to union official Bob Boatwright some time before April 1, 1997, and to the United Auto Workers local chairman employed at GMC, Wayne Belue, approximately one week later. Belue advised Duncan to report her allegations directly to Tom Pilkington who was the personnel director at the GMC plant. Duncan met with Pilkington, Boatwright, and Belue on April 1, 1997. During that meeting, Duncan recounted Booth's antics and explained that she previously had never complained to GMC

management about Booth. Pilkington told Duncan that he needed to meet with Al Moellenhoff, GMC's Equal Employment Opportunity (EEO) coordinator. After the meeting, Personnel Director Pilkington removed the planter from Booth's office and contacted Moellenhoff and requested that he begin an investigation. Pilkington also informed the College that Duncan reported being harassed at GMC. Duncan met with EEO Coordinator Moellenhoff and agreed to prepare a written statement recounting the alleged incidents with Booth. In the meantime, MoellenhOff prepared a list of suggested corrective actions for GMC to initiate. Duncan resigned prior to submitting her written allegations to GMC and prior to GMC's initiation of any of the suggested corrective actions.

Duncan filed a charge of sex discrimination with the Equal Employment Opportunity Commission (EEOC) on October 30, 1997. The EEOC issued Duncan a right to sue notice on April 17, 1998. Alleging sexual harassment and constructive discharge, Duncan filed suit against the College and GMC under both Title VII of the Civil Rights Act and the Missouri Human Rights Act. Duncan settled with the College prior to trial. After the jury found in Duncan's favor on both counts against GMC, GMC filed a posttrial motion for judgment as a matter of law or, alternatively, for a new trial. The district court denied the motion. The district court also awarded Duncan attorneys' fees in conjunction with GMC's posttrial motion. GMC appeals.

II.

A. Hostile Work Environment

GMC argues that it was entitled to judgment as a matter of law on Duncan's hostile work environment claim because she failed to prove a prima facie case. We agree. We review the district court's denial of a motion for judgment as

a matter of law de novo, using the same standard as the district court. *Brown v. Lester B. Cox Med. Ctrs.*, 286 F.3d 1040, 1044 (8th Cir. 2002). Judgment as a matter of law is proper "when all the evidence points in one direction and is susceptible to no reasonable interpretation supporting the jury verdict." *Blackmon v. Pinkerton Sec. & Investigative Servs.*, 182 F.3d 629, 635 (8th Cir. 1999) (internal quotations omitted).

Under Title VII, an "employer" is prohibited from discriminating against "any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Passing for the moment the thorny issue of whether GMC was actually Duncan's employer under the statute, we turn our attention to the merits of her claims. In order to succeed on a claim of hostile work environment sexual harassment, Duncan was required to prove "that she was a member of a protected group, that she was subjected to unwelcome sexual harassment, that the harassment was based on sex, and that the harassment affected a term, condition, or privilege of her employment." *Beard v. Flying J. Inc.*, 266 F.3d 792, 797-98 (8th Cir. 2001).

It is undisputed that Duncan satisfies the first two elements of her prima facie case: she is a member of a protected group and Booth's attention was unwelcome. We also conclude that the harassment was based on sex. An offensive workplace atmosphere does not amount to unlawful discrimination unless one gender is treated differently than the other. *See Oncale v. Sundowner Offshore Servs.. Inc.*, 523 U.S. 75, 80 (1998). The fundamental issue is whether members of one sex are subjected to unfavorable conditions of employment that the members of the opposite sex are not. *Id.* Although there is some evidence in the record that indicates some of Booth's behavior, and the

resulting offensive and disagreeable atmosphere, was directed at both male and female employees, GMC points to ten incidents when Booth's behavior was directed at Duncan alone. GMC concedes that five of these ten incidents could arguably be based on sex: (1) Booth's proposition for a "relationship"; (2) Booth's touching of Duncan's hand; (3) Booth's request that Duncan sketch his planter; (4) the Man Hater's Club poster; and (5) Booth's request that Duncan type the He-Men Women Haters beliefs. "A plaintiff in this kind of case need not show. . . that only women were subjected to harassment, so long as she shows that women were the primary target of such harassment." *Beard*, 266 F.3d at 798. We conclude that a jury could reasonably find that Duncan and her gender were the overriding themes of these incidents. The evidence is sufficient to support the jury finding that the harassment was based on sex.

We agree, however, with GMC's assertion that the alleged harassment was not so severe or pervasive as to alter a term, condition, or privilege of Duncan's employment. *See Scusa v. Nestle U.S.A. Co.*, 181 F.3d 958, 967 (8th Cir. 1999). To clear the high threshold of actionable harm, Duncan has to show that "the workplace is permeated with discriminatory intimidation, ridicule, and insult." *Harris v. Forklift Sys., Inc.*, 510 U. S. 17, 21 (1993) (internal quotations omitted). "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment--an environment that a reasonable person would find hostile or abusive--is beyond Title VII's purview." *Oncale*, 523 U.S. at 81 (internal quotation omitted). Thus, the fourth part of a hostile environment claim includes both objective and subjective components: an environment that a reasonable person would find hostile and one that the victim actually perceived as abusive. *Harris*, 510 U.S. at 21-22. In determining whether the conduct is sufficiently severe or pervasive, we look to the totality of the

circumstances, including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* at 23. However, Title VII is "not designed to purge the workplace of vulgarity." *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430(7th Cir. 1995). These standards are designed to "filter out complaints attacking the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing." *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (internal quotations omitted).

The evidence presented at trial illustrates that Duncan was upset and embarrassed by the posting of the derogatory poster and was disturbed by Booth's advances and his boorish behavior; but, as a matter of law, she has failed to show that these occurrences in the aggregate were so severe and extreme that a reasonable person would find that the terms or conditions of Duncan's employment had been altered. *See Scusa*, 181 F.3d at 967 (experiencing unpleasant conduct and rude comments does not equate to severe or pervasive harassment that altered conditions of employment). Numerous cases have rejected hostile work environment claims premised upon facts equally or more egregious than the conduct at issue here. *See Shepherd v. Comptroller of Pub. Accounts*, 168 F.3 d 871, 872, 874 (5th Cir.) (holding that several incidents over a two-year period, including the comment "your elbows are the same color as your nipples," another comment that plaintiff had big thighs, repeated touching of plaintiff's arm, and attempts to look down the plaintiffs dress, were insufficient to support hostile work environment claim), *cert. denied*, 528 U.S. 963 (1999); *Adusumilli v. City of Chicago*, 164 F.3d 353, 357, 361-62 (7th Cir. 1998) (holding conduct insufficient to support hostile environment claim when employee teased plaintiff,

made sexual jokes aimed at her, told her not to wave at police officers "because people would think she was a prostitute," commented about low-necked tops, leered at her breasts, and touched her arm, fingers, or buttocks on four occasions), *cert. denied*, 528 U.S. 988 (1999); *Black,v. Zaring Homes, Inc.*, 104 F.3d 822, 823-24, 826 (6th Cir.) (reversing jury verdict and holding behavior merely offensive and insufficient to support hostile environment claim when employee reached across plaintiff, stating "[n]othing I like more in the morning than sticky buns" while staring at her suggestively; suggested to plaintiff that parcel of land be named "Hootersville," "Titsville," or "Twin Peaks"; and asked "weren't you there Saturday night dancing on the tables?" while discussing property near a biker bar), *cert. denied*, 522 U.S. 865 (1997); *Weiss v. Coca-Cola Bottling Co.*, 990 F.2d 333, 337 (7th Cir. 1993) (holding no sexual harassment when plaintiffs supervisor asked plaintiff for dates, asked about her personal life, called her a "dumb blond," put his hand on her shoulder several times, placed "I love you" signs at her work station, and attempted to kiss her twice at work and once in a bar).

Booth's actions were boorish, chauvinistic, and decidedly immature, but we cannot say they created an objectively hostile work environment permeated with sexual harassment. Construing the evidence in the light most favorable to Duncan, she presented evidence of four categories of harassing conduct based on her sex: a single request for a relationship, which was not repeated when she rebuffed it, four or five isolated incidents of Booth briefly touching her hand, a request to draw a planter, and teasing in the form of a poster and beliefs for an imaginary club. It is apparent that these incidents made Duncan uncomfortable, but they do not meet the standard necessary for actionable sexual harassment. It is worth noting that Duncan fails to even address this component of her prima facie case in her

brief. We conclude as a matter of law that she did not show a sexually harassing hostile environment sufficiently severe or pervasive so as to alter the conditions of her employment, a failure that dooms Duncan's hostile work environment claim. *See Meritor Sav. Bank. FSB v. Vinson*, 477 U.S. 57, 67 (1986).

B. Constructive Discharge

GMC also challenges the jury's finding that Duncan was constructively discharged. An employee is constructively discharged if an employer renders the employee's working conditions so intolerable that the employee is forced to quit. *See Henderson v. Simmons Foods. Inc.*, 217 F.3d 612, 617 (8th Cir. 2000). An employee's dissatisfaction with working conditions does not establish a constructive discharge. *See Tidwell v. Meyer's Bakeries. Inc.*, 93 F.3d 490, 496 (8th Cir. 1996). To be reasonable "an employee has an obligation not to assume the worst and not to jump to conclusions too quickly. An employee who quits without giving [her] employer a reasonable chance to work out a problem has not been constructively discharged." *Summit v. S-B Power Tool*, 121 F.3d 416, 421(8th Cir. 1997) (internal quotations omitted), *cert. denied*, 523 U.S. 1004 (.1998). To be liable, GMC must have intended to force Duncan to quit or at least have reasonably foreseen Duncan's resignation as a consequence of the working conditions at GMC. *See Phillips v. Taco Bell Corp.*, 156 F.3d 884, 890 (8th Cir. 1998). Duncan contends that she faced over two years of harassment by Booth, which ultimately forced her to resign in May 1997. When viewed in the light most favorable to her, Duncan's working conditions were certainly not ideal and in many instances the environment that Duncan endured at GMC was offensive and disrespectful; however, these conditions were not so intolerable as to cause a reasonable person to resign and

cannot support the jury's findings to the contrary. "Constructive discharge requires considerably more proof than an unpleasant and unprofessional environment." *Jones v. Fitzgerald*, 285 F.3d 705, 716 (8th Cir. 2002).

In addition, Duncan did not give GMC a reasonable opportunity to work out the problem with Booth prior to submitting her resignation. After the April 1 meeting with Pilkington, Boatwright, and Belue, Pilkington immediately removed the planter from Booth's office and requested that EEO Coordinator Moellenhoff begin an investigation. That April 1 meeting was the first time that Duncan had complained to GMC's management officials who had the responsibility to take action on her complaint. Moellenhoff asked Duncan to prepare a written summary of her allegations, she agreed to do so, but she never followed through and had not submitted any written allegations at the time of her resignation. Given that the "policies underlying Title VII will be best served. . . [when] unlawful discrimination is attacked within the context of existing employment relationships," we conclude that Duncan failed to provide GMC with a reasonable time to investigate her unwritten allegations and to implement significant changes to her workplace environment. *See Coffman v. Tracker Marine, L.P.*, 141 F.3d 1241, 1247 (8th Cir. 1998) (internal quotations omitted); *see also Perry v. Harris Chernin, Inc.*, 126 F.3d 1010, 1015 (7th Cir. 1997) ("[U]nless conditions are beyond 'ordinary' discrimination, a complaining employee is expected to remain on the job while seeking redress."). We also conclude that Duncan could have taken steps short of resignation to improve her working conditions, but she declined to do so: Duncan rejected the College's offer to transfer her to an alternative work location. *See Jones*, 285 F.3d at 716 (discussing alternatives to resignation of which plaintiff did not avail herself). Duncan's constructive discharge claim fails as a matter of law.

Because we hold that Duncan fails to set forth sufficient evidence to establish a prima facie case that she was subjected to either a hostile work environment or that she was constructively discharged, we assume, without deciding, for purposes of this appeal that Duncan was GMC's employee. In addition, because we conclude that Duncan's claims fail as a matter of law and judgment must be entered in favor of GMC, we need not address the other arguments advanced by GMC.

III.

For the foregoing reasons, we reverse the district court's denial of judgment as a matter of law. Because GMC should have prevailed on its posttrial motion, the award of attorneys' fees is likewise vacated.

RICHARD S. ARNOLD, Circuit Judge, dissenting.

The Court concludes that the harassment suffered by Ms. Duncan was not so severe or pervasive as to alter a term, condition, or privilege of her employment, and that, therefore, GMC is entitled to judgment as a matter of law on her hostile-work- environment and constructive-discharge claims. I respectfully disagree.

Ms. Duncan was subjected to a long series of incidents of sexual harassment in her workplace, going far beyond "gender-related jokes and occasional teasing." *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (citation omitted). When the evidence is considered in the light most favorable to her, and she is given the benefit of all reasonable inferences, there is "substantial evidence to

sustain the cause of action." *Stockmen's Livestock Market. Inc. v. Norwest Bank of Sioux City*, 135 F.3d 1236, 1240 (8th Cir. 1998) (citation omitted). In Ms. Duncan's case, a jury reached the conclusion that Mr. Booth's offensive behavior created a hostile work environment. I believe this determination was reasonable and supported by ample evidence.

Ms. Duncan was subjected to a sexual advance by her supervisor within days of beginning her job. This proposition occurred during work hours and was a direct request for a sexual relationship. The Court characterizes this incident as a "single request," *ante* at 9. This description minimizes the effect of the sexual advance on Ms. Duncan's working conditions. During the months immediately following this incident, Mr. Booth became hostile to Ms. Duncan, increased his criticism of her work, and degraded her professional capabilities in front of her peers. Significantly, there is no suggestion that this hostile behavior occurred *before* Ms. Duncan refused his request for sex. From this evidence, a jury could easily draw the inference that Mr. Booth changed his attitude about Ms. Duncan's work because she rejected his sexual advance.

Further, this sexual overture was not an isolated incident. It was only the beginning of a string of degrading actions that Mr. Booth directed toward Ms. Duncan based on her sex. This inappropriate behavior took many forms, from physical touching to social humiliation to emotional intimidation. For example, Mr. Booth repeatedly touched Ms. Duncan inappropriately on. her hand. He publicly singled her out before her colleagues as a "Man Hater" who "must always be in control of" sex. He required her to choose between drawing a vulgar planter displayed in his office or not being considered for a promotion, an unfair choice that would likely intimidate a reasonable person from seeking further career advancement.

The Court cites cases in which our sister Circuits have rejected hostile-work-environment claims premised upon facts that the Court determines to be "equally or more egregious" than the conduct at issue here. I do not agree that Ms. Duncan experienced less severe harassment than those plaintiffs. For example, in *Weiss v. Coca-Cola Bottling Co.*, 990 F.2d 333 (7th Cir. 1993), the plaintiff did not allege that her work duties or evaluations were different because of her sex. This is not the situation Ms. Duncan faced. She was given specific tasks of a sexually charged nature, such as typing up the minutes of the "He-Man Women Hater's Club." Performing this "function" was presented to her as a required duty of her job.

Also Ms. Duncan was subjected to allegations that she was professionally "incompetent because of her sex." *Shepherd v. Comptroller of Public Accounts*, 168 F.3d 871, 874-75 (5th Cir.), *cert. denied*, 528 U.S. 963 (1999) (relying on the lack of such allegations in affirming grant of summary judgment for employer). She adduced evidence of this factor when she testified that after she rejected his sexual advance, Mr. Booth more critical of her work. With the request for her to draw the planter for a promotion, Ms. Duncan also faced "conduct that would prevent her from succeeding in the workplace," a fact that Ms. Shepherd could not point to in her case. Additionally, Ms. Duncan was "propositioned" to sleep with her employer, *id.* at 872, a claim not made by Ms. Shepherd.

Finally, we note that in Ms. Duncan's case the harassing acts were directed specifically at her. The Court in *Black v. Zaring Homes*, 104 F.3d 822, 826 (6th Cir.), *cert. denied*, 522 U.S. 865 (1997), stated that the lack of specific

comments to the plaintiff supported the conclusion that the defendant's conduct was not severe enough to create actionable harm. By contrast, in the present case, a jury could reasonably conclude that Ms. Duncan felt particularly humiliated and degraded by Mr. Booth's behavior because she alone was singled out for this harassment.

Our own Court's Title VII jurisprudence suggests that Ms. Duncan experienced enough offensive conduct to constitute sexual harassment. For example, in *Breeding v. Arthur J. Gallagher and Co.* we reversed a grant of summary judgment to an employer, stating that a supervisor who "fondled his genitals in front of" a female employee and "used lewd and sexually inappropriate language" could create an environment severe enough to be actionable under Title VII. 164 F.3d 1151, 1159 (8th Cir. 1999). In *Rorie v. United Parcel Service*, we concluded that a work environment in which "a supervisor [ ] pats a female employee on the back, brushes up against her, and tells her she smells good" could be found by a jury to be a hostile work environment. 151 F.3d 757, 762 (8th Cir. 1998). Is it clear that the women in these cases suffered harassment greater than Ms. Duncan? I think not.

We have acknowledged that "[t]here is no bright line between sexual harassment and merely unpleasant conduct, so a jury's decision must generally stand unless there is trial error." *Hathaway v. Runyon*, 132 F.3d 1214, 1221 (8th Cir. 1998). We have also ruled that "[o]nce there is evidence of improper conduct and subjective offense, the determination of whether the conduct rose to the level of abuse is largely in the hands of the jury." *Howard v. Burns Bros., Inc.*, 149 F.3d 835, 840 (8th Cir. 1998). The Court admits that Ms. Duncan took subjective offense to Mr. Booth's behavior and characterizes Mr. Booth's behavior as "boorish, chauvinistic, and decidedly immature." *Ante* at 9. Thus, the Court appears to agree that Mr. Booth's behavior was "improper conduct."

I believe the Court errs in deciding as a matter of law that the jury did not act reasonably in concluding that Ms. Duncan faced severe or pervasive harassment that created a hostile work environment.

Therefore, I dissent from the Court's conclusion that Ms. Duncan did not present sufficient evidence to survive judgment as a matter of law on her hostile work-environment and constructive-discharge claims.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DIANA DUNCAN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 4:98CV01220 (CEJ)
	)	
GENERAL MOTORS CORPORATION,	)	
	)	
Defendant.		

MEMORANDUM AND ORDER

This matter is before the court on the renewed motion of defendant General Motors Corporation for judgment as a matter of law or, in the alternative, for a new trial and request for remittitur. Plaintiff has responded to the motion, and the issues have been fully briefed.

Defendant argues that it is entitled to judgment as a matter of law because plaintiff failed to timely exhaust her claims with the appropriate administrative agencies. According to the defendant, plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) and/or the Missouri Commission on Human Rights (MCHR) on. November 25, 1997, which was 202 days after she resigned her employment. Because the Missouri Human Rights Act (MHRA) requires that an administrative charge be filed within 180 days of the alleged act of discrimination, defendant argues that plaintiff's charge

was untimely. See Mo. Rev. Stat. §213.075.1. The defendant also argues that plaintiff failed to present evidence of a sufficient number of incidents of sexual harassment occurring within the 300-day period prior to the November 25, 1997 charge. *See Gipson v. KAS Snacktime Company*, 171 F.3d 574, 579 (8th Cir. 1999). Under Title VII of the Civil Rights Act of 1964, an administrative charge must be filed within 300 days of the alleged discriminatory act. .42 IJ §2000e-5(1).

In its motion, defendant refers to a "perfected" charge filed on November 25, 1997. At trial, plaintiff introduced into evidence Exhibit 67A, a charge questionnaire she submitted to the EEOC dated October 17 1997. She also introduced Exhibit 67B, a form dated October 30. 1997 reflecting the EEOC's transmittal of plaintiff's charge to the MCHR. The transmittal form refers to a charge of discrimination filed by plaintiff with the EEOC on October 27, 1997.

The charge questionnaire was signed by plaintiff under penalty of perjury. The Eighth Circuit has held that an intake questionnaire does not satisfy the statutory requirements of an EEOC charge if it is unverified. *See Shempert v. Harwick Chemical Corp.*, 151 F.3d 793, 796 (8th Cir. 1998) In this case, however, the Court finds that plaintiff's complaint was verified, and thus qualifies as an. EEOC charge. *Id.* at 797 (charge must be "in writing under oath or affirmation"); 29 C.F.R. § 1601.3(a) (verified means sworn or affirmed before notary public, or supported by unsworn declaration in writing under penalty of perjury). *Cf. Burgess v. Moore*, 39 F.3d 216, 218 (8th Cir. 1994) (prisoner affidavit and complaint signed under penalty of perjury should have been treated as verified); 28 U.S.C. § 1746 (unsworn declarations under penalty of perjury satisfy verification requirement). Even if the charge questionnaire

could not qualify as an administrative charge, there remains the evidence that plaintiff filed a charge with the EEOC on October 27, 1997. Thus, the Court finds that plaintiff filed a charge with the administrative agencies within the 180-day period required by the MHRA.

For- purposes of Title VII, the plaintiff was required to prove that she was subjected to sexual harassment within the 300-day period preceding the administrative charge The evidence presented at trial established that plaintiff was subjected to an ongoing course of harassment that consisted of incidents that occurred both within and outside the 300-day period. Because plaintiff established a continuing violation, her charge of discrimination was timely under Title VII. *See Rorie v. United Parcel Service, Inc.*, 151 F.3d 757, 761 (8th Cir. 1998).

Defendant next argues that under Missouri law plaintiff cannot recover damages for emotional distress absent a physical injury unless she presents expert medical testimony. Because the plaintiff did not present such testimony at trial, defendant argues that she is precluded from recovering emotional distress damages under the MHRA.

Relying on the Missouri Supreme Court's decision in *Bass v. Nooney Co.*, 646 S.W.2d 765, 772-73 (Mo. 1983) (en banc, and subsequent decisions by the Missouri Court of Appeals, the Eighth Circuit has held that expert medical testimony is required in order to recover damages for emotional distress in an action brought under the MHRA. *Glover v. McDonnell Douglas Corp.*, 981 F.2d 388, 395 (8th Cir. 1992), *vacated on other grounds*, 510 U. S. 802 (1993); *see also Collins v. Burg*, 169 F.3d 563, 565 (8th Cir. 1999). Since that time, however, the Missouri Court of Appeals held that *Bass* was inapplicable to a claim under the MHRA, and

that the tort standard for emotional distress damages does not apply to civil rights cases brought under the MHRA. *See Missouri Commission on Human Rights v. Red Dragon Restaurant, Inc.*, 991 S.W. 161, 170-71 (Mo. Ct. App. 1999).

This Court must determine what Missouri law is and apply it. *See B.B. v. Continental Ins. Co.* 8 F.3d 1288, 1291 (8th Cir. 993). The *Red Drag Restaurant* case, decided subsequent to the Eighth Circuit's *Glover* and *Collins* decisions, has clarified the ruling in *Bass* on the issue of emotional distress damages under Missouri law. The Court finds the *Red Dragon Restaurant* decision to be persuasive authority. *See Aetna Casualty & Sur. Co. v. General Dynamics Corp.*, 968 F.2d 707, 712-13 (8th Cir. 1992) (decisions of state appellate courts are persuasive, and court must follow them when they are best evidence of what state law is). Thus, the Court concludes that plaintiff was not required to present expert medical testimony in order to obtain emotional distress damages under the MHRA.

The Court has previously addressed the remaining arguments in the defendant's motion for judgment as a matter of law, and will not grant judgment based on those arguments for the reasons previously stated. In support of its alternative motion for a new trial or for remittitur, defendant argues that the jury's damages award is duplicative, cumulative, and grossly exceeds the amount necessary to compensate plaintiff.

The decision whether to reduce damages is within the Court's discretion. *See Thorne v. Welk Investment, Inc.* 197 F.3d 1205, 1211 (8th Cir. 1999). A jury verdict is not considered excessive unless the result is "monstrous" or "shocking." *Id.* (quoting *Jenkins v. McLean Hotels, Inc.*, 859 F.2d 598, 600 (8th Cir. 1988)) The Court does not find that the jury verdict in this case meets the standard to be

considered excessive. The evidence presented at trial established that throughout her employment plaintiff was subjected to sexual harassment by an individual who purported to have the authority to fire her. Plaintiff testified that the harassment caused her to withdraw from family life, become nervous, cry regularly, and become sick to her stomach frequently. The verdict was not excessive in light of the evidence presented to the jury. Thus, the request for remittitur will be denied.

Accordingly,

IT IS REREBY ORDERED that the renewed motion of defendant General Motors Corporation for judgment as a matter of law or, in the alternative, motion for a new trial and request for remittitur [#116] is **denied**.

CAROL E. JACKSON
UNITED STATES DISTRICT JUDGE

Dated this 25th day of July, 2000.

APPENDIX C

DIANA DUNCAN, Plaintiff, v. JUNIOR COLLEGE DISTRICT OF ST. LOUIS, ST. LOUIS COUNTY, MISSOURI, d/b/a ST. LOUIS COMMUNITY COLLEGE, and GENERAL MOTORS CORPORATION, Defendants.

No. 4:98CV01220 (CEJ)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

1999 U.S. Dist. LEXIS 22451

November 15, 1999, Decided
November 15, 1999, Filed

DISPOSITION: Defendant GMC's motion for summary judgment denied.

COUNSEL: For DIANA DUNCAN, plaintiff: Daniel T. Dalton, THOMAS J. NOONAN, P.C., St. Louis, MO.

For DIANA DUNCAN, plaintiff: Stephen M. Ryals, Michael J. Beckermann, RYALS AND SOFFER, P.C., Clayton, MO.

For DIANA DUNCAN, plaintiff: Michael A. Gross, St. Louis, MO.

For JUNIOR COLLEGE DISTRICT OF ST. LOUIS, MISSOURI, defendant: Kathi L. Chestnut, GREENSFELDER AND HEMKER, St. Louis, MO.

For GENERAL MOTORS CORPORATION, defendant: Jerry M. Hunter, Charles B. Jellinek, Daniel M. O'Keefe,

Timothy C. Mooney, Jr., BRYAN CAVE LLP, St. Louis, MO.

JUDGES: CAROL E. JACKSON, UNITED STATES DISTRICT JUDGE.

OPINION BY: CAROL E. JACKSON

OPINION: MEMORANDUM AND ORDER

This matter is before the court on the motion of defendant General Motors Corporation (GMC) for summary judgment. Plaintiff opposes the motion and the issues have been fully briefed.

Plaintiff Diana Duncan was employed by the Junior College District of St. Louis (the College) from August 1994 to May 1997, and she was assigned to perform her job duties in the High Tech training area at GMC's manufacturing facility in Wentzville, Missouri. Plaintiff alleges that she was subject to a hostile work environment based on her gender and was constructively discharged from her employment, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., and the Missouri Human Rights Act (MHRA), Mo. Rev. Stat. § 213.010 et seq.

I. Legal Standard

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In ruling on a motion for summary judgment the court is required to view the facts in the light most favorable to the non-moving

party and must give that party the benefit of all reasonable inferences to be drawn from the underlying facts. *AgriStor Leasing v. Farrow*, 826 F.2d 732, 734 (8th Cir. 1987). The moving party bears the burden of showing both the absence of a genuine issue of material fact and its entitlement to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Matsushita Electronic Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986); Fed. R. Civ. P. 56(c). Once the moving party has met its burden, the non-moving party may not rest on the allegations of his pleadings but must set forth specific facts, by affidavit or other evidence, showing that a genuine issue of material fact exists. Fed. R. Civ. P. 56(e). Rule 56(c) "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corporation v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

II. Factual Background

Plaintiff was employed and paid by the College as a Technical Training Clerk in the Center for Business, Industry and Labor. She was assigned to the High Tech area of the GMC plant, and performed tasks at the direction of Jim Booth, an hourly employee of GMC who held the title "training coordinator." Plaintiff learned of the employment opportunity through Booth, who was an acquaintance. Plaintiff was hired for the position by Jerry Reese, a College employee, and if she had questions about her job duties or hours, she would contact Reese to clarify what she was required to do. College employees in the High Tech area believed that Booth had the authority to promote, terminate,

or grant them salary increases, but there is no evidence that Booth had the actual authority to affect the terms of their employment in that way.

In October 1994, Booth directed plaintiff to meet him at a bar during working hours. During the meeting, Booth asked plaintiff whether she would be interested in having an affair with him. She said that she would not, and left the bar. Plaintiff told Joe Rolen, a Paint Supervisor at GMC, about the incident, and Rolen responded that that was the kind of reputation Booth had.

During plaintiff's employment, Booth ridiculed her work in front of other people, falsely accused her of being late for work, yelled at her if she stated that Reese was her boss, and told her that he would replace her with a "Kelly girl." He did not treat other employees in the same manner. Booth required plaintiff to perform personal tasks for him, such as scheduling haircut appointments, utility hookups, and car repairs.

In 1995, a poster was displayed in plaintiff's work area indicating that plaintiff was the "President and Chief Executive Officer of the Man Haters Club of America." In April 1995 or 1996, Booth had plaintiff "arrested" for a charity fund-raising event. He arranged for the mock arrest, despite having been told that plaintiff would react negatively because of her recent involvement in the prosecution of a person who had assaulted her and who had threatened to bring false arrest charges against her. Booth then insisted paying plaintiff's bail and picking her up, and after doing so, he took her to a bar across the street from the apartment in which she had been assaulted.

In approximately June 1996, plaintiff requested Booth to consider her for the position of Illustrator. As a drawing test,

Booth instructed plaintiff to draw a picture of a planter in his office that was in the form of a man with a cactus protruding from his pants like a penis. Other individuals applying for positions as Illustrators were instructed to draw van parts. Booth commented to people that it was plaintiff's job to take care of his cactus. In March or April 1997, Booth showed plaintiff a pacifier with a plastic penis connected to its end.

In January or February 1997, plaintiff talked to Bob Boatwright, Booth's supervisor, about the treatment she had received from Booth. At Boatwright's direction, plaintiff discussed Booth's conduct with Tom Pilkington, GMC's Personnel Director, on April 1. After hearing plaintiff's complaints, Pilkington confiscated the planter from the High Tech area the same day. Pilkington asked plaintiff to talk with Al Moellenhoff, GMC's EEO Coordinator. When plaintiff met with Moellenhoff on April 11, she told him about the various incidents, giving approximate dates and the names of witnesses. Moellenhoff asked plaintiff to give him copies of her notes or anything else concerning the incidents that she had in her possession and a written statement detailing the circumstances of the incidents she reported. Plaintiff told Moellenhoff that she would need to talk to her attorney before providing anything to him. Plaintiff discussed with various supervisors the possibility of being moved to an office in the front of the plant in order to get away from Booth, but she was told that GMC had decided against it. Plaintiff asked Rolen to find her a place to work in one of the other trailers throughout the plant, but she was not given the opportunity to move to another area.

On May 5, 1997, Booth instructed plaintiff to type the "He-Man Women Haters Club Rules," which he had written. Plaintiff submitted her letter of resignation on May 7, 1997. Earl Schack, a GMC supervisor, apologized to employees in the High Tech area after plaintiff left, stating that he knew of

the situation and had not done anything about it. On May 20, 1997 Moellenhoff counseled Booth about the inappropriate behavior alleged by plaintiff.

GMC's policy on sexual harassment was posted above its entrances. Plaintiff read a GMC book titled "How to Manage Sexual Harassment Situations" as early as 1995, but she did not receive any training on sexual harassment from GMC. She did not know which GMC officials handled sexual harassment complaints.

III. Discussion

GMC first argues that it was not plaintiff's employer under Title VII, but rather that plaintiff was employed by the College. The Eighth Circuit has held that Title VII protects workers who are employees, but does not protect independent contractors. *See Wilde v. County of Kandiyohi*, 15 F.3d 103, 104 (8th Cir. 1994). In determining whether an individual is an employee or an independent contractor, the Eighth Circuit uses a hybrid test of general common-law concepts, taking into account the economic realities. *Id.* at 105. Accordingly, the factors to be considered include the hiring party's right to control the work product, whether the work is usually done under the direction of a supervisor, the skill required in the occupation, whether the employer furnishes the equipment and place of work, the method of payment, the manner in which the work relationship is terminated, whether annual leave is afforded, whether the work is an integral part of the business, whether the individual accrues retirement benefits, whether the employer pays social security taxes, and the intent of the parties. *See Wilde v. County of Kandiyohi*, 811 F. Supp. 446, 451-52 (D. Minn. 1993), *aff'd*, 15 F.3d 103. The Court does not believe plaintiff can be considered an employee of GMC, given that GMC did not pay her salary or afford her any other benefits.

Some courts, however, have held that a defendant may be deemed an employer for purposes of Title VII if the defendant has a sufficient degree of control over plaintiff's access to the job market. *See Sibley Mem'l Hosp. v. Wilson*, 160 U.S. App. D.C. 14, 488 F.2d 1338 (D.C. Cir. 1973). While the Eighth Circuit has not addressed whether a plaintiff may maintain a Title VII action against a defendant who has interfered with the plaintiff's employment opportunities with a third party, other district courts in this circuit have used the Sibley analysis to deem a defendant an employer under Title VII. *See Moland v. Bil-Mar Foods*, 994 F. Supp. 1061, 1072-73 (N.D. Iowa 1998); *King v. Chrysler Corp.*, 812 F. Supp. 151, 152 (E.D. Mo. 1993).

The Court finds that GMC may be held liable under Title VII under this analysis. Plaintiff performed her job only at the GMC plant, GMC employees gave her work instructions, and a GMC employee with apparent, if not actual, authority over plaintiff was responsible for the allegedly hostile work environment. That hostile environment caused plaintiff to terminate her employment with the College. *See King*, 812 F. Supp. at 153.

GMC next argues that plaintiff was not the subject of harassment severe enough to be actionable under Title VII. On her hostile environment claim, plaintiff must prove that "'discrimination based on sex has created a hostile or abusive work environment.'" *See Rorie v. United Parcel Svc.*, 151 F.3d 757, 761 (8th Cir. 1998) (quoting *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 66, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1986)). To be actionable, the sexual harassment must be sufficiently severe or pervasive to alter the conditions of employment and create an abusive work environment. *Rorie*, 151 F.3d at 761. Thus, plaintiff must show both an

objectively hostile environment and that she subjectively perceived the conditions as abusive. Id.

The Court believes that plaintiff has presented sufficient facts from which the trier of fact may find that a hostile environment existed and that plaintiff perceived the conditions as abusive. Plaintiff alleged that she left work crying on several occasions, vomited frequently, lost sleep, and suffered embarrassment.

GMC argues that it is not vicariously liable for any harassment by Booth, as he was not a GMC supervisor and did not have any supervisory authority over plaintiff. Plaintiff argues that College employees believed Booth was their supervisor, that GMC should have known of Booth's harassment when plaintiff told Rolen of Booth's request for a sexual relationship, and that Schack knew of the harassment and failed to act.

The Court finds that sufficient questions of fact exist regarding whether GMC can be held vicariously liable for Booth's conduct, or whether management level employees knew or should have known about the offensive conduct. *See Davis v. Tri-State Mack Distributor, Inc.*, 981 F.2d 340, 343 (8th Cir. 1992). Even assuming GMC first learned of the alleged harassment when plaintiff reported it to Pilkington on April 1, 1997, the Court finds that a question of fact exists regarding whether GMC took prompt remedial action to remedy the situation at that time. Although Moellenhoff states that he was waiting for detailed information from plaintiff before conducting an investigation, a jury could believe that GMC had sufficient facts to at least begin an investigation based on the facts plaintiff had given. *See Howard v. Burns Bros., Inc.*, 149 F.3d 835, 841 (8th Cir. 1998) (promptness and adequacy of employer's response to harassment complaint are fact questions for jury). In

addition, GMC officials decided against moving plaintiff to another part of the plant while the investigation was taking place, although further incidents of harassment occurred after plaintiff complained to Pilkington.

GMC argues that plaintiff's sexual harassment claim is not timely, as she failed to file her EEOC charge within 300 days of an incident of sexual harassment. Some dispute exists between the parties as to the date on which plaintiff filed her EEOC complaint. Defendant asserts that plaintiff's EEOC complaint was filed on November 25, 1997, and submits an EEOC complaint bearing that date and marked as "perfected" charge number 28090118. Plaintiff alleges that her EEOC charge was filed on October 30, 1997, and submits a notice of charge of discrimination to GMC with that date. The notice contains the same charge number, and indicates that plaintiff had filed a charge of discrimination based on sex under Title VII against GMC. GMC does not argue that the earlier, apparently "unperfected," charge was insufficient to constitute an EEOC charge. Accordingly, the court will accept for purposes of this summary judgment motion that plaintiff's EEOC charge was filed on October 30, 1997. *See* 29 C.F.R. § 1601.12(b) (1997) (charge may be amended to cure technical defects, and amendments will relate back to date charge was first received).

A complaining party must file a charge with the EEOC within 300 days of the discriminatory act. *See* 42 U.S.C. § 2000e-5(e)(1); *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 572 (8th Cir. 1997). Thus, acts occurring back to January 1997 are within the time period covered by plaintiff's EEOC charge. If plaintiff can show an ongoing pattern or practice of discrimination, however, the alleged violation will be deemed continuing. *See Rorie v. United Parcel Svc., Inc.*, 151 F.3d 757, 761 (8th Cir. 1998). Moreover, even if a plaintiff is unable to show a continuing

violation, instances of harassment occurring outside the time period may provide relevant background to later discriminatory acts. *See id.* The Court finds that plaintiff alleged sufficient acts occurring within the 300-day period, given the alleged background acts outside the period, to present a fact question for the jury regarding whether the conduct constituted sexual harassment.

GMC finally argues that plaintiff has no evidence that she was constructively discharged by GMC. To show a constructive discharge, plaintiff must show more than a Title VII violation by her employer; she must show that her employer deliberately rendered her working conditions intolerable and thus forced her to quit her job. *See Phillips v. Taco Bell Corp.*, 156 F.3d 884, 890 (8th Cir. 1998). Her resignation must have been a reasonably foreseeable consequence of her employer's discriminatory actions. See id. The Court believes that a fact question exists as to whether it was reasonably foreseeable to GMC officials that plaintiff would be forced to quit her job if she were required to continue working under the conditions she had reported to them.

Accordingly,

IT IS HEREBY ORDERED that defendant GMC's motion for summary judgment [# 52] is **denied**.

CAROLE JACKSON

UNITED STATES DISTRICT JUDGE

Dated this 15th day of November, 1999.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00—3544/02—1411

Diana Duncan,	*	
	*	
Appellee,	*	
	*	Order Denying Petition
	*	for Rehearing and for
v.	*	Rehearing En Banc
General Motors Corporation,	*	
	*	
Appellant.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Murphy, Judge Bye, Judge Melloy, and Judge Smith would grant the petition for rehearing en banc.

Judge McMillian, Judge Loken, and Judge Morris S. Arnold took no part in the decision in this matter.

(5128—010199)

November 15, 2002

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED
MAR 14 2003
OFFICE OF THE CLERK

No. 02-1201

IN THE

Supreme Court of the United States

DIANA DUNCAN,
Petitioner,

v.

GENERAL MOTORS CORPORATION,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should grant certiorari to review the peculiar facts of this claim of sexual harassment to determine whether the Court of Appeals correctly held that petitioner failed to make a submissible jury case.

RULE 29.6 STATEMENT

Respondent is General Motors Corporation. It has no parent corporation, and no publicly-held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
STATEMENT OF FACTS	1
Background	1
Petitioner's Complaints to GMC Management	5
Proceedings Below	8
REASONS FOR DENYING THE PETITION	8
I. THIS CASE PRESENTS NOTHING MORE THAN THE APPLICATION OF AN ADMITTED STANDARD OF REVIEW TO A UNIQUE SET OF FACTS.	8
II. REVERSAL OF THE JURY VERDICT WAS ALSO APPROPRIATE ON GROUNDS NOT REACHED BY THE COURT OF APPEALS.	14
CONCLUSION	16

TABLE OF AUTHORITIES

	Page
Celotex Corp. v. Catrett, 477 U.S. 317 (1986) ...	10
Faragher v. City of Boca Raton, 524 U.S. 775 (1998) ...	11
Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993) ...	10, 11
Llampallas v. Mini-Circuits Lab, Inc., 163 F.3d 1236 (11th Cir. 1998), *cert. denied*, 528 U.S. 930 (1999) ...	15
Mangram v. General Motors Corp., 108 F.3d 61 (4th Cir. 1997) ...	15
Neely v. Martin K. Eby Constr. Co., 386 U.S. 317 (1967) ...	9, 10
Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998) ...	11
Serapion v. Martinez, 119 F.3d 982 (1st Cir. 1997), *cert. denied*, 522 U.S. 1047 (1998) ...	15
Todd v. Ortho Biotech, Inc, 175 F.3d 595 (8th Cir. 1999) ...	14
Weisgram v. Marley Co., 528 U.S. 440 (2000)...	9, 10
Wilde v. County of Kandiyohi, 15 F.3d 103 (8th Cir. 1994) ...	15
Zirpel v. Toshiba America Info. Sys., 111 F.3d 80 (8th Cir. 1997) ...	14

Other Authorities

9A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure §2536 (2d ed. 1995) ...	10

Fed. R.Civ. P. 50 ..... 9, 10

Fed. R. Civ. P. 56 ..... 9, 10

Respondent General Motors Corporation ("GMC") respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Eighth Circuit's opinion in this case, reported at 300 F.3d 928 (8th Cir. 2002).

STATEMENT OF FACTS
Background

Petitioner was hired by the St. Louis Community College District ("District") in August 1994 to work as a Technical Training Clerk at its Center for Business, Industry, and Labor ("CBIL") program at GMC's Wentzville, Missouri, plant (Tr. 205-06, 333-35). Under the CBIL program, the District assisted GMC in training its employees (Tr. 582, 587-88). Petitioner was advised from the outset of her employment by her supervisor, Jerry Reese, Manager of Operations, Manufacturing, and Training for the District, that she was employed by the District (Tr. 205-06, 538). Petitioner recognized Reese's — and by extension, the District's — supervisory authority over her employment. She submitted to Reese her weekly time sheets and bi-weekly Activity Summary Reports on District forms (Tr. 338-41).

Petitioner's job description required her in part to perform clerical duties for GMC employees (Tr. 342-45). Although the petition and the dissenting opinion below refer to Jim Booth, the alleged harasser, as petitioner's supervisor, in fact he was an hourly union employee who was the union's Training Coordinator in the High Tech area (Tr. 206, 276-77, 686-88).[1]

[1] The trial court rejected petitioner's proposed jury instruction submitting her claim on the theory of supervisor harassment, and instructed instead on the theory of co-employee harassment (Tr. 1013-15, 1100-01). Petitioner did not cross-appeal from the court's

Continued on Next Page

Petitioner testified that very shortly after she began working in the High Tech area in 1994, Booth called her and asked her to meet him off-site at a restaurant (Tr. 213-15). At that meeting, according to petitioner, Booth told her that he was unhappy in his marriage and that he was in love with a co-worker. He then asked petitioner, "Would you be willing to have a relationship with me?" (Tr. 215-16). Petitioner responded in the negative, and Booth later apologized and asked petitioner if they "could start over" (Tr. 216, 218). Petitioner did not allege that Booth ever again approached her for a date, let alone a relationship. Petitioner told Joe Rolen, a paint supervisor at the Wentzville plant, that Booth had asked her if she wanted to have a relationship shortly after that incident occurred, but did not complain about it (Tr. 216-217, 355-56).

After this off-site meeting, petitioner testified, she perceived a difference in Booth's treatment of her (Tr. 218). She offered a laundry list of actions by Booth that she claimed evidenced this change in behavior, but was vague about the dates on which these events occurred. She testified that he began to criticize her working hours and her job performance, stating that "he could hire a Kelly person and get better service" (Tr. 219, 235-36). Petitioner conceded that Booth directed similar threats to all District employees of both sexes:

> "Whenever *we* did something Jim didn't like, he constantly made reference to he got — he was training out [sic] or he got Lewis and Clark College out or he got this person fired or that person. And

---

Footnote 1 Continued

refusal to submit her case on a supervisor-harassment theory. Hence, the references to Booth as a "supervisor" in the petition and the dissenting opinion are simply wrong.

> he would make numerous threats towards *us*. If *we* did something wrong — myself, mainly — he would make sure that *we* no longer worked there" (Tr. 298, emphasis added; see also Tr. 299).

Other District employees testified that Booth threatened their jobs and the jobs of all the District employees (Tr. 526, 703-04, 723).

Booth's computer had a screen saver with the image of a naked woman (Tr. 233). Petitioner had to work on Booth's computer for certain tasks because the computer the District provided her did not have the necessary software program loaded on it and was not on GMC's system (Tr. 528-30, 761-62).

Booth directed petitioner to eat lunch where she could hear the telephones (Tr. 219). Petitioner admitted that Booth gave directions to other District employees as well, male and female (Tr. 224-25, 226-27). On four or five occasions Booth touched petitioner's hand when she handed him the phone (Tr. 233-34). She wasn't sure whether she told Booth or a co-worker that she did not want him to do that, and was able to avoid it simply by changing the manner in which she handed the phone to him (Tr. 233-34).

Throughout petitioner's tenure with the District, Booth kept in his office an eight-inch high ceramic figure in the shape of a man holding a planter containing a cactus (Tr. 222-23, 530). The cactus appeared as if it protruded from the man's pants (Tr. 530). The planter, which petitioner viewed on a daily basis for more than two years before she complained about it, was in full sight of all employees, including males (Tr. 267, 554). Sometime between June 1995 and June 1996, petitioner told Booth she wanted to be promoted to an illustrator position (Tr. 230, 330-31). She testified

that Booth told her she would have to "prove her artistic ability" by drawing the planter, with the cactus in it (Tr. 230-31). Petitioner later learned that she lacked the required degree to become an illustrator, and that in any event Booth had no authority to hire illustrators (Tr. 233, 382, 384).

Petitioner introduced into evidence, over GMC's objections, several cartoons drawn by a District employee which were displayed in her work area on unspecified dates, "possibly" in 1995 (Tr. 239-47, 249-58, 331-32). One was a poster of the "Man Hater's Club of America," listing petitioner as President and CEO (Tr. 253-54). Although the poster was drawn by a District employee, petitioner testified vaguely that Booth "participated" in its creation (Tr. 240, 253-54, 256, 258), but did not connect him to the display of the poster.

Petitioner testified that on two separate occasions Booth displayed to her, and to other people in the office, a pacifier shaped like a penis (Tr. 297, 407-08). Petitioner's response was, "You're ignorant. Show Lisa [Kearney]" (Tr. 407-08). She never told any GMC supervisor about the pacifier, and was unable to say when it was shown to her, and likewise did not establish that she had complained about the hand-touching (Tr. 297, 407-09, 465, 612-18, 885-95, 922-29, 971-73).

In April 1996, Booth and Gene Spurgeon, a District employee, arranged to have petitioner "arrested" as part of a charity event. Petitioner testified that she "got scared" when the "police officer" approached her, but she agreed to be escorted out of the plant by the officer after it was explained to her that it was for charity (Tr. 269-70). When Booth bailed her out, over her objection he drove her to a bar (Tr. 271-72). Petitioner did not claim that Booth engaged in any inappropriate behavior at the bar.

Petitioner's Complaints to GMC Management

Petitioner testified that she complained to Reese of the District regarding Booth's treatment of her and met with an attorney in 1994 or 1995 and in 1996 or January 1997 (Tr. 312-14). Several GMC hourly employees told her in early 1995 that she should talk to Betty Kling in GMC's Human Resources department regarding Booth's treatment, but she never did so (Tr. 401, 492). Although she claims to have told both Rolen and Training Coordinator Ed Ish that it was difficult to work with Booth, she never offered any specifics (Tr. 425, 489). Petitioner acknowledged that she was not sure how much Ish knew about Booth's conduct (Tr. 367-68, 411, 972).

It was not until April 1, 1997, that petitioner voiced any objection or complaint to any member of GMC's management regarding alleged sexual harassment on the part of Booth (Tr. 407, 411-22, 424-25, 463-65, 469, 511-12). Sometime before April 1, petitioner related to Bob Boatwright, a union official, "everything that [she] had been through, beginning with 1994" (Tr. 308, 373). Within a week, she again recounted her "story" to Boatwright and Wayne Belue, chairperson of the UAW local at the Wentzville plant (Tr. 308, 421). Petitioner agreed, at Belue's suggestion, to meet with Tom Pilkington, GMC's personnel director at Wentzville (Tr. 308-09).

Petitioner told Pilkington that she had not previously complained to any member of GMC's management (Tr. 617). Although she had taken pictures of Booth's planter, and had kept copies of the Man-Hater's Club poster and other items, she did not show any of those pictures or exhibits to Pilkington (Tr. 676-77). Nor did she bring to the meeting her notes of the events complained of, including dates of specific incidents (Tr. 431-32).

At their meeting, Pilkington assured petitioner that she would not lose her job over her complaints, and that GMC took sexual harassment very seriously (Tr. 426-27, 430, 633). He advised her that she would need to meet with Al Moellenhoff, GMC's EEO Coordinator (Tr. 617-18). Pilkington went to Booth's office later that same day and removed the planter and locked it in a desk drawer (Tr. 623-26). He also called Moellenhoff, gave him basic information regarding petitioner's complaints, and asked him to call petitioner and to conduct an investigation (Tr. 634-35, 883).

Pilkington contacted Rebecca Admire, Director of the CBIL program for the District, and told her that petitioner felt that she had been harassed, and that the District should respond (Tr. 656-57). He left a message for petitioner on April 18, and then called Admire to tell her that petitioner still had not given him the requested statement (Tr. 681-82).

At a meeting on April 11, 1997, petitioner agreed to provide Moellenhoff with copies of the documents she mentioned, as well as a written statement memorializing her allegations (Tr. 370-71, 373, 435, 885-86). Moellenhoff told her he was counting on her written statement to enable him to conduct his investigation (Tr. 886).

Petitioner testified that on May 5, 1997, Booth asked her to type up the beliefs of what she called the "He-Men Women-Haters' Club," which he had drafted (Tr. 303-07). She refused. Two days later, without ever having submitted the requested written statement of her allegations, petitioner tendered her resignation to Jerry Reese, Steve Long, and Rebecca Admire of the District (Tr. 466). She indicated on her EEOC questionnaire that she resigned on the advice of counsel.

Thus, of the specific acts of which petitioner complained, only five — the inquiry about a relationship, the hand-touching, the poster, the "He-Men" beliefs, and the direction to draw the planter — were directed to petitioner alone (and not to male employees as well) and had any arguable basis in sex or gender. And those five incidents were sprinkled over more than two and one-half years.

Prior to petitioner's resignation, Long had offered to relocate her to another District work site, but she refused because it would inconvenience her (Tr. 443-44). The day she quit, she became aware that GMC managers had discussed moving her to a different location within the Wentzville plant, but she had already made up her mind that she was going to resign her position with the District (Tr. 444-47). At the time of her resignation, petitioner had a job offer from an investment broker and had been talking to a lawyer (Tr. 313-14, 467-68).

Shortly after petitioner resigned, Moellenhoff and Steve Eastvold, GMC's Supervisor of Labor Relations for the Wentzville plant, counseled Booth regarding the planter, put him on notice of possible future disciplinary action if they received further information, and told him the investigation was ongoing (Tr. 908-10). They reminded Booth of GMC's sexual harassment policy and told him to stop any prohibited actions immediately (Tr. 909-10). Shortly afterwards, Moellenhoff held a special sexual harassment course for all union officials and GMC employees connected with training operations, including Booth (Tr. 911). GMC received no complaints of sexual harassment against Booth after he was put on notice on May 20, 1997 (Tr. 912).

Proceedings Below

After settling her claim with the District, petitioner proceeded to trial against GMC. On December 3, 1999, a jury in the Eastern District of Missouri returned a verdict in favor of petitioner on both counts of her complaint, alleging sexual harassment and constructive discharge. She was awarded $700,000 in damages for emotional distress on her sexual harassment claim, and $300,000 for emotional distress on the constructive discharge count.

After the district court denied GMC's post-trial motions, GMC appealed to the Eighth Circuit. On August 22, 2002, the Court of Appeals reversed and ordered dismissal of the complaint holding (a) that petitioner had failed to make a jury submissible case that the alleged harassment was sufficiently severe or pervasive so as to alter the conditions of her employment and (b) that she was not constructively discharged as a matter of law. Chief Judge David Hansen wrote the majority opinion for himself and Judge Roger Wollman; Senior Judge Richard Arnold filed a dissenting opinion. Rehearing en banc was denied with four active judges voting in favor, four opposed, and three abstaining (Pet. Apdx 33a).

Petitioner has filed a petition in this Court addressing her sexual harassment claim only.

REASONS FOR DENYING THE PETITION

I. THIS CASE PRESENTS NOTHING MORE THAN THE APPLICATION OF AN ADMITTED STANDARD OF REVIEW TO A UNIQUE SET OF FACTS.

Petitioner asks this Court to spend its scarce resources deciding whether the peculiar evidence of sexual

harassment adduced in this case falls just beyond or just short of the threshold required for jury consideration. The standard of review proposed by the petition (p. 9) does not differ from that employed by the majority opinion below — or, for that matter, from that used by the dissent. The majority acknowledged that judgment as a matter of law is proper only "when the evidence points in one direction and is susceptible to no reasonable interpretation supporting the jury verdict" (Pet. Apdx 7a). The Court properly proceeded to examine the totality of the evidence, construing it in the light most favorable to petitioner (*id.* at 8a-9a). The dissent did not take issue with the standard applied by the majority, but only with its application in the context of this case.

The dispute, therefore, is not about the standard of review but, rather, how that standard applies to the evidence of sophomoric behavior depicted in the record below. It is hard to imagine how this Court's application of that established standard to these facts would provide meaningful guidance in other cases of alleged harassment featuring completely different boorish antics or obnoxious comportment.

The underlying theme of the petition seems to be that jury verdicts in discrimination cases are sacrosanct and must be insulated from appellate scrutiny. Such a notion not only conflicts with the duties imposed on federal judges by Rules 50 and 56 of the Federal Rules of Civil Procedure, but also ignores decisions of this Court such as *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 329 (1967), and *Weisgram v. Marley Co.*, 528 U.S. 440, 443, 454 (2000), which reaffirmed the right and duty of the appellate courts to examine the evidentiary record and exercise their "informed discretion" to "decide whether, as a matter of law, judgment should be entered in favor of a verdict loser." Petitioner's crabbed

view of the role of judicial oversight not only runs afoul of *Neely* and *Weisgram* but also of summary judgment decisions such as *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), recognizing the right of the judiciary to dispose of factually unsupported claims as a matter of law.

It is black letter law that:

> "In determining whether a motion for judgment as a matter of law should have been granted, the appellate court applies the same standard as does the trial court in passing on the motion originally. . . . Whether judgment as a matter of law should be granted is a question of law and on questions of that character litigants are entitled to full review by the appellate court without special deference to the views of the trial court." 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §2536 (2d ed. 1995).

The review of the record by the Court of Appeals which led to its conclusion that petitioner did not make a submissible harassment case is just the sort of legal determination necessarily made by trial and appellate courts every day, whether pursuant to Rule 50 or 56.

Petitioner cites Justice Scalia's concurring opinion in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 24 (1993) (Pet. 8-9), but those comments do not support her argument that the Eighth Circuit's opinion represents a departure from this Court's precedent. In his concurrence in *Harris*, Justice Scalia lamented the lack of certitude afforded by the standard for actionable sexual harassment set forth in the majority opinion, and expressed his concern that "today's holding lets virtually unguided juries decide whether sex-related conduct engaged in (or permitted by) an employer is egre

gious enough to warrant an award of damages." 510 U.S. at 24. Justice Scalia's concurrence certainly does not constitute an endorsement of the proposition – underlying petitioner's thesis – that jury verdicts in harassment cases should be insulated from appellate review.

Since *Harris*, this Court has emphasized that Title VII is not intended to be "a general civility code," *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998); that "'simple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment'"; and that "conduct must be extreme to amount to a change in the terms and conditions of employment." *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (citation omitted). "Properly applied, [the Court's standards for judging hostility] will filter out complaints attacking 'the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.'" *Id.* at 788. Thus, Justice Scalia's concern regarding inadequate guidance provided to juries has been ameliorated by this Court's subsequent decisions. And although petitioner maintains that the Court of Appeals' opinion "conflicts with . . . the Court's guidance in *Harris*" (Pet. 11), it is the affirmance of the jury's verdict sought by petitioner – based on conduct that was inappropriate but not extreme, severe, or pervasive – that would conflict with this Court's body of authority regarding the proper standards for judging workplace hostility.

Contrary to petitioner's assertion that "[t]here can be no doubt that the Eighth Circuit improperly weighed the evidence and the credibility of the witnesses" (Pet. 10 n.5), she points to no specific credibility determina

tions, recalibration of evidence, or inference-drawing by the Court of Appeals. Petitioner confuses the Court of Appeals' determination that her evidence was legally insufficient to sustain the verdict with "improperly weigh[ing] the evidence and the credibility of the witnesses" (Pet. 10 n.5). The Eighth Circuit did not make its own factual findings, but accepted as true all of petitioner's evidence regarding the alleged harassment, concluding as a matter of law that petitioner came up short.

Petitioner's recitation of cases from other circuits, in an effort to compare their views concerning the legality of a broad range of conduct, is not a productive exercise (Pet. 13-15). The facts described in the parentheticals for cases imposing liability are taken out of context, and represent in most instances less than all of the evidence presented by the plaintiff. Even so, the wide variety of immature and crude behavior in the cited cases demonstrates the futility of attempting to craft a "one size fits all" standard for limitless permutations of sex-related comments, actions, gadgets, names, etc. Because of the nature of the subject matter, the decision below has limited precedential value. What guidance, for example, would the Eighth Circuit's treatment of a ceramic planter-with-cactus afford for another court confronted with conduct of the kind found in the cases discussed by petitioner? Each case is intensely fact-specific.

Similarly unhelpful is petitioner's reference to a statistical analysis regarding "appellate court behavior" in civil rights cases (Pet. 17-18). Review of such statistics in a vacuum, without any information regarding the facts and circumstances at issue in each case, adds nothing to petitioner's claim that the Eighth Circuit erred in reversing the judgment *in this case*, or

that the federal appellate courts as a whole are applying improper or inconsistent standards in reviewing employment cases. Notwithstanding petitioner's concern about "correct[ing] . . . unfavorable perception[s]" (Pet. 18), each case must be assessed with regard to the particular facts and circumstances at issue to determine whether a submissible case of sexual harassment has been met under the guidelines set forth by this Court.

Petitioner opines that "[p]erhaps juries nationwide are no more consistent in their case-to-case determinations than the several courts of appeals," but states that "juries in these cases are not creating an inconsistent and confused body of judicial precedent" (Pet. 15). On the contrary, allowing jury verdicts to stand despite insufficient supporting evidence – particularly when they are of the magnitude involved here – unfairly penalizes the employers involved in those cases, and encourages disgruntled employees to roll the litigation dice. Appellate scrutiny is necessary to provide as much balance and legal oversight as possible, given the often-thin line between rudeness and harassment, between personality conflicts and antagonism rooted in chauvinism, and between performance-based discipline and gender-based discipline.

Because the Eighth Circuit's review of the evidence supporting the verdict here was necessarily specific to the particular facts before it, it is singularly inappropriate for this Court's review, as the dedication of further judicial resources would yield little, if any, guidance for future cases brought on entirely different facts.

II. REVERSAL OF THE JURY VERDICT WAS ALSO APPROPRIATE ON GROUNDS NOT REACHED BY THE COURT OF APPEALS.

Although the Eighth Circuit's determination that petitioner "did not show a sexually harassing hostile work environment sufficiently severe or pervasive so as to alter the conditions of her employment" was dispositive of GMC's appeal, GMC raised several other potentially determinative issues that the panel did not reach. As reflected in our Statement of Facts, the Eighth Circuit's judgment is supportable not only on the basis discussed by that court, but also because GMC neither knew nor should have known of Booth's conduct and took prompt actions to stop any harassment once petitioner finally complained. Because of its ruling on the "severe and pervasive" prong, the Court of Appeals did not reach these other two aspects of a submissible case, either of which would likewise require judgment for respondent. *See Todd v. Ortho Biotech, Inc.*, 175 F.3d 595, 598 (8th Cir. 1999); *Zirpel v. Toshiba America Info. Sys.*, 111 F.3d 80, 81 (8th Cir. 1997). Given these sufficient bases for the Eighth Circuit's judgment, it makes little sense to consider the issue raised by the petition in the context of this case, which can be resolved in GMC's favor on several alternative grounds to be briefed by GMC if certiorari is granted.

And there is yet another impediment to review of petitioner's Question Presented. Petitioner's claim was also defective because she was not an employee of respondent. Rather, as the Statement of Facts indicates, she was employed by the District and was assigned to work in the District's CBIL at respondent's plant in Wentzville, Mo. (Tr. 205-06, 333-35). She applied to and was hired by the District, and virtually all details of her employment were controlled by the

District (Tr. 204-07, 334-35). Her job description was supplied by the District, which paid her and provided other benefits (Tr. 242-43, 335, 685-86). Her time sheets were submitted to the District, and she addressed her resignation to the District manager (Tr. 339-41, 349).

Respondent contended at trial and on appeal that petitioner had no claim against it because she was not an employee of GMC and therefore was not entitled to sue it under Title VII, which covers persons who are "employees." *See, e.g., Wilde v. County of Kandiyohi*, 15 F.3d 103, 104 (8th Cir. 1994) (Title VII protects workers who are employees, not independent contractors); *Llampallas v. Mini-Circuits Lab, Inc.*, 163 F.3d 1236, 1242-43 (11th Cir. 1998) (courts have almost universally held that the scope of the term "any individual" is limited to employees; only those plaintiffs who are employees may bring a Title VII law suit), *cert. denied*, 528 U.S. 930 (1999); *Serapion v. Martinez*, 119 F.3d 982, 985 (1st Cir. 1997) ("courts long ago concluded that Title VII is directed at, and only protects, employees and potential employees"), *cert. denied*, 522 U.S. 1047 (1998); *Mangram v. General Motors Corp.*, 108 F.3d 61, 62 (4th Cir. 1997) (ADEA, which contains same "any individual" language as Title VII, covers only employees).

The district court ruled that petitioner's cause could proceed notwithstanding her status. The Court of Appeals declined to decide the issue because of its ruling that petitioner was not a victim of sex discrimination (Pet. Apdx 11). If certiorari is granted, however, respondent also reserves the right to seek affirmance of the judgment below on the alternative ground that petitioner is not a person entitled to invoke Title VII *vis-à-vis* GMC.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 02-1201

IN THE

Supreme Court of the United States

DIANA DUNCAN,

Petitioner,

—v.—

GENERAL MOTORS CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF OF NOW LEGAL DEFENSE AND EDUCATION FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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March 17, 2003

IN THE

SUPREME COURT OF THE UNITED STATES

Diana Duncan,

Petitioner,

v.

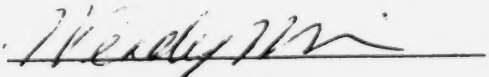
General Motors Corp.,

Respondent.

MOTION FOR LEAVE TO FILE A BRIEF

AS AMICUS CURIAE

NOW Legal Defense and Education Fund moves for leave, pursuant to Rule 37(2)(b) of the Rules of the Supreme Court of the United States, to file a brief as *amicus curiae* in support of Petitioner in order to place before the Court relevant matter that has not already been brought to its attention. The interests of the proposed *amicus* in this matter are set forth in the Statement of Interest herein. We file herewith a letter of consent from Petitioner's counsel the Lawyers Committee for Civil Rights Under Law. Respondent's counsel has informed us that it has been unable to reach Respondent to obtain its consent.



WENDY R. WEISER

March 17, 2003

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES. iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. THIS COURT SHOULD INTERVENE TO IMPEDE THE GROWING TREND OF COURTS USURPING THE FUNCTION OF JURIES IN SEXUAL HARASSMENT CASES 3

A. The Eighth Circuit Erroneously Removed the Issue of Whether a Hostile Work Environment Existed From the Jury. 3

B. The Problem of Courts Inappropriately Replacing Jurors as Fact-Finders in Sexual Harassment Cases is Widespread . 4

II. THE DECISION BELOW AND OTHERS LIKE IT THWART CONGRESSIONAL INTENT TO GIVE VICTIMS OF WORKPLACE SEXUAL HARASSMENT A MEANINGFUL REMEDY. 7

A. When Congress Enacted the Civil Rights Act of 1991, It Was Especially Concerned with Giving Victims of Sexual Harassment a Right to Seek Damages. . . . 7

B. Congress Intended Juries to Decide Sexual Harassment Claims. 10

III. THE COURT SHOULD REAFFIRM THAT HOSTILE WORK ENVIRONMENT DETERMINATIONS ARE QUESTIONS OF FACT FOR JURIES. 11

A. The Decision Below Conflicts with This Court's Precedents. 11

B. Hostile Work Environment Claims are Particularly Suited to Jury Determinations. 13

IV. PERMITTING APPELLATE REDETERMINATION OF WHETHER HARASSMENT IS SEVERE OR PERVASIVE UNDERMINES THE SEVENTH AMENDMENT AND JUDICIAL ECONOMY. 17

CONCLUSION 19

TABLE OF AUTHORITIES

Cases PAGE

Anderson v. City of Bessemer City,
470 U.S. 564 (1985) 18

Bales v. Wal-Mart Stores, Inc.,
143 F.3d 1103 (8th Cir. 1998) 13

Beardsley v. Webb,
30 F.3d 524 (4th Cir. 1994) 13

Baskerville v. Culligan Int'l Co.,
50 F.3d 428 (7th Cir. 1995) 5

Black v. Zaring Homes, Inc.
104 F.3d 822 (6th Cir. 1997) 4, 5

Burlington Industries v. Ellerth,
524 U.S. 742 (1998) 1

Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558
(1990) 18

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687
(1999) 14, 15

Clark County School District v. Breeden,
532 U.S. 268 (2001) 13

Colgrove v. Battin, U.S. District Judge,
413 U.S. 149 (1973) 17

Dimick v. Schiedt, 293 U.S. 474 (1935) 18

Duncan v. General Motors Corp.,
300 F.3d 928 (8th Cir. 2002) 2, 3, 14

Faragher v. City of Boca Raton,
524 U.S. 775 (1998) 1

Gallagher v. Delaney,
139 F.3d 338 (2d Cir. 1998) 17

Gasperini v. Center for Humanities, Inc.,
518 U.S. 415 (1996) 17

Harris v. Forklift Systems, Inc.,
510 U.S. 17 (1993) . . . . . *passim*

Kenyon v. Western Extrusions Corp.,
2000 U.S. Dist. LEXIS 391
(N.D. Tex. Jan. 6, 2000) 6

Mendoza v. Borden, Inc.,
195 F.3d 1238 (11th Cir. 1999) 5

Meritor Savings Bank, FSB v. Vinson,
477 U.S. 57 (1986) 12, 14

Mitchell v. OsAir, Inc.,
629 F. Supp. 636 (N.D. Ohio 1986) 7

Morris v. Oldham County Fiscal Court,
201 F.3d 784 (6th Cir. 2000) 6

Ocheltree v. Scollon Prods., Inc.
308 F.3d 351 (4th Cir. 2002) 4

O'Shea v. Yellow Technology Services, Inc.,
185 F.3d 1093 (10th Cir. 1999) 13

Oncale v. Sundowner Offshore Services, Inc.,
523 U.S. 75 (1998) 1, 12, 13, 14

Patterson v. McLean Credit Union,
491 U.S. 164 (1989) 8

Raniola v. Bratton,
243 F.3d 610 (2nd Cir. 2001) 12, 13

Robinson v. Jacksonville Shipyards, Inc.,
760 F. Supp. 1486 (M.D. Fla. 1991) 1

Taylor v. Louisiana,
419 U.S. 524 (1975) 15

Theil v. Southern Pac. Co.,
328 U.S. 217 (1946) 15

Statutes and Rules

Civil Rights Act of 1991, Pub. L. No. 102-166 7

Fed. R. Civ. P. 1 18

Other Authorities

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Congressional and Legislative History

H.R. Rep. No. 90-1076 (1968) 15

H.R. Rep. No. 101-644 (1990) 8

H. R. Rep. No. 102-40(I-II) (1991) . . . . . *passim*

S. Rep. No. 101-315 (1990) 9

Hearings on H.R. 1, The Civil Rights Act of 1991 Before the House Comm. On Educ. and Labor, 102nd Cong. (1991) 9

Joint Hearings on H.R. 4000, The Civil Rights Act of 1990, Before the House Comm. on Educ. and Labor and the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 101st Cong. (1990), vols. 1-3 . . . . . 9, 10, 11

STATEMENT OF INTEREST OF *AMICUS CURIAE*

NOW Legal Defense and Education Fund ("NOW Legal Defense" or "*Amicus*") submits this brief as *amicus curiae* in support of Petitioner Diana Duncan.[1]

NOW Legal Defense is a leading national non-profit civil rights organization that for over thirty years has used the power of the law to define and defend women's rights. A major goal of NOW Legal Defense is the elimination of barriers that deny women economic opportunity, such as sexual harassment. NOW Legal Defense has litigated cases to secure full enforcement of laws prohibiting sexual harassment, including *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991), and has filed briefs in this Court as *amicus curiae* on leading sexual harassment cases, including *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), and *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993). NOW Legal Defense is deeply concerned with the trend, exemplified by the decision below, in which courts substitute their own fact-finding for jury determinations of sexual harassment.

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[1] As stated in the motion to file this brief, a copy of Petitioner's letter of consent is filed herewith, but Respondent has not consented. Pursuant to Rule 37.6, counsel for *amicus curiae* certify that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae*, or its counsel, has made a monetary contribution to this brief's preparation or submission.

SUMMARY OF THE ARGUMENT

The Eighth Circuit's decision in *Duncan v. General Motors Corp.*, 300 F.3d 928 (8th Cir. 2002), is exemplary of a widespread problem in the lower courts: More and more, Courts of Appeals are reversing jury findings of fact in hostile work environment sexual harassment cases. The Eighth Circuit decision, and others like it, supplanted the jury's determination as to whether the harassing conduct at issue was sufficiently severe or pervasive to create a hostile work environment with that of the court, and it did so without providing any legal basis or standards for its decision. This Court should grant the petition for a writ of *certiorari* to reverse the trend of appellate courts usurping the role of juries in sexual harassment cases and to reaffirm that the existence of a hostile work environment is a question of fact for the jury.

The Court should reverse the Eighth Circuit's decision for several reasons. First, the decision below thwarts Congress's intent in the Civil Rights Act of 1991 to afford victims of workplace harassment a meaningful remedy in the form of damages. In enacting that law, Congress intended that juries would determine whether or not sexually harassing conduct created a hostile work environment, and explicitly provided for the right to a jury trial. Second, the decision below conflicts with this Court's precedents that the existence of a hostile work environment, and particularly the severity and pervasiveness of harassing conduct, are questions of fact for the jury. Indeed, juries are especially well suited to conduct the examination this Court has directed be undertaken in such cases, by considering all the facts and circumstances of the harassing conduct, the context in which it occurred, and how a reasonable person would respond. Third, by re-examining the facts in the record, the decision below undermines both the Seventh

Amendment right to a jury trial and judicial economy. The petition should therefore be granted.

ARGUMENT

I. THIS COURT SHOULD INTERVENE TO IMPEDE THE GROWING TREND OF COURTS USURPING THE FUNCTION OF JURIES IN SEXUAL HARASSMENT CASES

A. The Eighth Circuit Erroneously Removed the Issue of Whether a Hostile Work Environment Existed From the Jury

The Eighth Circuit in this case erroneously held, "as a matter of law," that the sexually harassing conduct the jury found to create a hostile work environment was not "so severe and extreme that a reasonable person would find that the terms or conditions of Duncan's employment had been altered." *Duncan*, 300 F.3d at 934. In reversing the jury's finding, the Eighth Circuit pointed to no legal error in the jury instructions or the litigation conduct. Instead, it characterized the defendant's proved behavior as "boorish, chauvinistic, and decidedly immature," and issued a conclusory statement that the facts presented at trial were insufficiently severe and pervasive to "meet the standard necessary for actionable sexual harassment." *Id.* In other words, under the guise of a legal ruling, the court merely substituted its own factual determination for that of the jury, and it did so without providing any reasoning or guidance for future cases.

As discussed below, the Eighth Circuit's decision to overturn the jury's finding of a hostile work environment contravenes Congress's intent to afford sexual harassment plaintiffs with jury trials for damages claims, this Court's sexual harassment decisions, and the Seventh Amendment right to trial by jury. As a result, the Court should grant a writ of *certiorari* and reverse the Eighth Circuit.

B. The Problem of Courts Inappropriately Replacing Jurors as Fact-Finders in Sexual Harassment Cases is Widespread

The Eighth Circuit's decision is part of a growing trend of courts inappropriately replacing juries as fact-finders in sexual harassment cases. *See generally* Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 Cornell L. Rev. 548, 568, 574 (2001) (study of every reported federal court opinion in sexual harassment cases between 1986 and 1995 revealed that courts are increasingly disposing of such claims as a matter of law and that "the success rate of plaintiffs [on appeal] varies dramatically by circuit"); Eric Schnapper, *Some of Them Still Don't Get It: Hostile Work Environment Litigation in the Lower Courts*, 1999 U. Chi. Legal F. 277, 302-03 (1999) (discussing appellate court cases holding as a matter of law that conduct did not create hostile environment).

For example, in *Ocheltree v. Scollon Prods., Inc.*, 308 F.3d 351, 2002 U.S. App. LEXIS 21145 (4th Cir. 2002), the Fourth Circuit considered a sexual harassment case in which the plaintiff was the only woman working in a costume shop. The court set aside the jury's verdict for the plaintiff, despite evidence that her co-workers regularly mimed sexual acts with a mannequin in order to bother her and engaged in "sexually explicit" "discussions" that "were generally degrading, humiliating, and even insulting," *id.* at *15; and that the environment worsened after she complained about it, *id.* at *19—conduct the dissenting judge characterized as creating "an atmosphere suffused with degrading images of female sexuality," *id.* at *54. Likewise, numerous courts have overturned jury determinations that sexual harassment was sufficiently severe or pervasive to violate Title VII. *See, e.g., Black v. Zaring Homes, Inc.*, 104

F.3d 822, 825, 826 (6th Cir. 1997) (reversing jury verdict that "sex-based," "offensive and inappropriate" comments that created "an atmosphere of a grade school level fascination with women's body parts combined with[] denigrating comments about women" constituted sexual harassment); *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430-31 (7th Cir. 1995) (reversing jury verdict that male supervisor sexually harassed his female secretary, where, among other things, supervisor made a "grunting sound" at her; suggested that she "run around naked"; made a "gesture intended to suggest masturbation" and commented about his lonely hotel room when she asked whether he'd bought his wife a Valentine's card; said plaintiff made his office "hot" by stepping into it; and called plaintiff a "pretty girl" and said that he might "lose control" around "pretty girls").

Other courts have deprived plaintiffs of the opportunity to have a jury decide their claims, granting summary judgment or approving directed verdicts despite substantial evidence of harassment. In *Mendoza v. Borden*, 195 F.3d 1238 (11th Cir. 1999), the en banc court upheld the district court's directed verdict on plaintiff's sexual harassment claim over the vigorous dissents of four judges. The jury had heard evidence that the highest ranking executive at the plant where the plaintiff worked constantly followed her around the facility; repeatedly "looked her up and down" in a sexual manner, sometimes pausing to "sniff" when his stare reached her groin area; intentionally rubbed his hip against hers while placing his hand on her shoulder; and responded to her complaint about his conduct with a sexually suggestive remark. *Id.* at 1242-43. The majority's holding that no jury could find this conduct to be sexual harassment prompted two lengthy dissents focused on the need to allow juries to make such determinations. *Id.* at 1269 (Tjoflat, J., dissenting); 1270

(Barkett, J., dissenting). *See also Morris v. Oldham County Fiscal Court*, 201 F.3d 784 (6th Cir. 2000) (affirming summary judgment despite evidence that supervisor told plaintiff she could improve her evaluation by performing sexual favors; frequently told sexual jokes; called plaintiff "Hot Lips"; commented about plaintiff's dress; and, after she complained and was transferred, repeatedly called her, made unauthorized visits to her work station, followed her home and spread nails on her driveway); *Kenyon v. Western Extrusions Corp.*, 2000 U.S. Dist. LEXIS 391, at *11, *18 (N.D. Tex. Jan. 6, 2000) (granting summary judgment despite fifty incidents of male supervisor "rubbing his genitals on [female plaintiff's] arm and shoulder, staring down her dress at her breasts, and touching and caressing her arm, shoulder, back, and hair in a sexual manner," on ground that plaintiff managed to perform her job despite harassment).[2]

Like the Eighth Circuit in this case, these courts often recite discrete incidents of harassing conduct, purged of contextual information, and then deem that conduct insufficiently severe or pervasive to be actionable under Title VII. Similarly, these courts fail to offer any legal framework for determining what conduct in what contexts would reasonably be viewed as severe or pervasive. This Court should intervene to halt the judicial usurpation of the jury function in hostile work environment cases.

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[2] As Judge Patricia Wald noted in connection with the increase in summary judgment rulings,

> Th[e] unseemly rush to summary judgment may cause the legal profession, and the public at large, to conclude that disfavored plaintiffs are apt to be hustled out of the courthouse. Indeed, the race and gender bias task forces of three different circuit courts have found that many attorneys believe this is often the fate of employment discrimination plaintiffs.

Patricia M. Wald, *Summary Judgment at Sixty*, 76 Tex. L. Rev. 1897, 1938 (1998).

II. THE DECISION BELOW AND OTHERS LIKE IT THWART CONGRESSIONAL INTENT TO GIVE VICTIMS OF WORKPLACE SEXUAL HARASSMENT A MEANINGFUL REMEDY

A. When Congress Enacted the Civil Rights Act of 1991, It Was Especially Concerned with Giving Victims of Sexual Harassment a Right to Seek Damages

One of Congress's primary purposes in enacting the Civil Rights Act of 1991, Pub. L. No. 102-166 (the "1991 Act"), was to give victims of workplace sexual harassment the right to present their claims to a jury and to obtain damages for violations of their rights. Because decisions like the one below severely curtail plaintiffs' access to the remedy and procedure Congress created, they are contrary to congressional intent.

Before the 1991 Act, victims of sexual harassment often lacked any real remedy for the discrimination they endured. This was true because Title VII then afforded only equitable remedies, *i.e.*, injunctive relief and back pay. *See* H.R. Rep. No. 102-40(I) (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 603 (hereinafter "1991 U.S.C.C.A.N. at --"). While the Title VII plaintiff who could prove discriminatory termination, or failure to hire or promote, was entitled to back pay, this remedy was useless to the harassment victim who continued working while enduring the abuse. Congress credited a federal court's observation that "'[t]here is little incentive for a plaintiff to bring a Title VII suit when the best that she can hope for is an order to her supervisor and to her employer to treat her with the dignity she deserves and the costs of bringing her suit.'" 1991 U.S.C.C.A.N. at 608 (quoting *Mitchell v. OsAir, Inc.*, 629 F. Supp. 636, 643 (N.D. Ohio 1986)). Moreover, because the general consensus of the lower courts was that back pay was

equitable in nature, the Title VII plaintiff had no right to a jury trial. H.R. Rep. No. 101-644 Pt. 2, at 66 (1990).

Congress recognized that victims of race discrimination, on the other hand, could and did bring suits for money damages under 42 U.S.C. § 1981 ("Section 1981"), claims that were heard by juries. 1991 U.S.C.C.A.N. at 603, 610-11.[3] When Congress crafted what became the Civil Rights Act of 1991, one of its two central goals was to eliminate this discrepancy in the nation's anti-discrimination laws, that is, "to conform remedies for intentional gender and religious discrimination to those currently available to victims of intentional race discrimination." *Id.* at 602.[4] In the 1991 Act, Congress for the first time authorized Title VII plaintiffs who complained of intentional discrimination to seek compensatory and punitive damages in addition to equitable relief.

The inadequacy of equitable relief to redress sexual harassment was a driving force behind this expansion of Title VII remedies. Congress was acutely aware of the "terrible humiliation, pain and suffering, psychological harm and related medical problems" caused by sexual harassment, *id.* at 604, and the "woeful inadequacy of Title VII's [then-] current remedial scheme" to redress it, *id.* at 605. Congress explained the need for a damages

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[3] This Court ruled in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), that Section 1981's prohibition of race discrimination in the making of contracts did not authorize suits for race discrimination after a "contract" had been formed—that is, for racial harassment or other forms of discrimination that took place during the course of employment—but the *Patterson* ruling did not affect the damages remedy or the right to a jury trial afforded by Section 1981.

[4] The other central goal of the 1991 Act was to make statutory amendments necessary to overcome various Supreme Court rulings, including *Patterson*, that affected burdens of proof and the scope of anti-discrimination laws. 1991 U.S.C.C.A.N. at 552.

remedy by describing numerous cases in which victims who had suffered terribly from sexual harassment were awarded nominal damages or none at all, even by courts that clearly credited their accounts of abuse. *Id.* at 604-06 & nn.63-64; H.R. Rep. No. 102-40(II), at 25-27 (1991), *reprinted in* 1991 U.S.C.C.A.N. at 694, 718-21; *see also* S. Rep. No. 101-315, at 32 (1990) (quoting testimony of now-Justice Thomas supporting expansion of Title VII remedies to include compensatory and punitive damages).[5] Congress also recognized that the absence of a damages remedy itself led many courts to conclude that sexual harassment was not actionable under Title VII, because the statute could provide no relief to the plaintiff. 1991 U.S.C.C.A.N. at 606 n.64 (describing cases in which courts found sexual harassment but awarded no relief under Title VII). Thus, by authorizing damages—and the accompanying jury trial—the 1991 Act gave victims of sexual harassment their first meaningful remedy under Title VII.

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[5] Over a two-year period, Congress amassed extensive evidence about the impact, cost, and extent of sexual harassment. *See, e.g., Hearings on H.R. 1, The Civil Rights Act of 1991 Before the House Comm. on Educ. and Labor*, 102nd Cong. 77-131, 168-235, 581-629 (1991); *Joint Hearings on H.R. 4000, The Civil Rights Act of 1990, Before the House Comm. on Educ. and Labor and the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong. (1990) ("*1990 Hearings*"), vol. 1 at 230-356; vol. 2 at 2-76; vol. 3 at 2-81.

B. Congress Intended Juries to Decide Sexual Harassment Claims

When it enacted the 1991 Act, Congress readily embraced the entry of jury trials into the evaluation of sexual harassment and other discrimination claims that a damages remedy would necessarily entail, declaring:

> The jury system is the cornerstone of our system of civil justice, as evidenced by the Seventh Amendment's guarantee. Just as they have for hundreds of years, juries are fully capable of determining *whether* an award of damages is appropriate and if so, how large it must be to compensate the plaintiff adequately and to deter future repetition of the prohibited conduct.

Id. at 610 (emphasis added).[6]

Congress recognized that sexual harassment claims sometimes presented thorny challenges of distinguishing between social interaction and actionable harassment—or, as one witness put it, "pinpoint[ing] the place at which the conduct becomes offensive"—and made clear that the jury was the appropriate body to sort through these issues. *1990 Hearings*, *supra* n.5, vol. 2, at 59; *id.* ("a jury of your peers can make a determination about whether you were too sensitive or whether you were properly offended and whether, in fact, you were damaged") (Rep. Miller); *id.* at 70 (under proposed legislation, "a jury of peers would determine that point along the continuum at which a person is harassed as opposed to just being kidded") (Rep. Poshard); *id.* at 72-73 (under proposed legislation, "the people who are smart enough to elect the members of Congress—that is, the people in most of our communities

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[6] Congress recognized that, under the Seventh Amendment, parties to actions for compensatory and punitive damages were entitled to trial by jury. 1991 U.S.C.C.A.N. at 610 n.66.

who vote—[would make] a determination after hearing the facts on both sides that the defendant ... is in violation of our law") (Rep. Washington). Congress had solid evidence for trusting juries to be arbiters of sexual harassment claims, citing the testimony of Professor Theodore Eisenberg, which supported the reliability of jury decisions on civil rights claims. *See* 1991 U.S.C.C.A.N. at 608, 610-11; *see also 1990 Hearings*, vol. 2, at 140, 154-55 (testimony of Prof. Eisenberg).

Congress delineated the judiciary's role in Title VII damages actions in traditional terms, that is, as reviewers of jury damage awards, not as ultimate fact-finders: "Judges serve as an additional check: they can and do reduce awards which are disproportionate to the defendant's discriminatory conduct or the plaintiff's resulting loss." H.R. Rep., 1991 U.S.C.C.A.N. at 610. Congress underscored these points by rejecting, as a violation of the Seventh Amendment, a proposed substitute for the damages remedy that would have prohibited jury trials in Title VII cases while authorizing judges to award up to $150,000 in "equitable" relief in Title VII cases where "harassment" was found. *Id.* at 640-41.

III. THE COURT SHOULD REAFFIRM THAT HOSTILE WORK ENVIRONMENT DETERMINATIONS ARE QUESTIONS OF FACT FOR JURIES

A. The Decision Below Conflicts with This Court's Precedents

In deciding, as a matter of law, the issue of whether sexually harassing conduct is sufficiently severe or pervasive to create a hostile work environment, the Eighth Circuit contravened this Court's precedents that severity and pervasiveness is a question of fact for the jury.

From the time this Court first acknowledged that Title VII prohibits sexual harassment, including hostile work environment harassment, *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986), it recognized that the existence of sexual harassment is a question of fact. Quoting the EEOC regulations, the Court explained that

> the *trier of fact* must determine the existence of sexual harassment in light of "the record as a whole" and "the totality of circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred."

Id. at 69 (citation omitted and emphasis added).[7]

In *Harris*, a unanimous Court reaffirmed that sexual harassment violates Title VII when it creates an "environment [that] would reasonably be perceived, and is perceived, as hostile or abusive." 510 U.S. at 22. The Court noted that "whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances." *Id.* at 23. In a concurring opinion, Justice Scalia explained that, under the Court's decision, "whether sex-related conduct engaged in (or permitted by) an employer is egregious enough to warrant an award of damages" is an issue of fact for the jury. *Id.* at 24; *cf. Oncale*, 523 U.S. at 80 (assuming that "trier of fact" would determine whether harassment is discriminatory).

Following this Court's precedents, numerous courts, including panels in the Eighth Circuit, recognize that the existence of a hostile work environment in a specific situation is "quintessentially" an issue of fact for the jury and that jury determinations in sexual harassment cases are entitled to deference. *See, e.g., Raniola v. Bratton*, 243 F.3d 610, 621 (2d Cir. 2001) (vacating grant of

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[7] Because *Meritor* was decided prior to the 1991 Act, sexual harassment plaintiffs did not yet have a right to jury trial.

defendants' motion for judgment as a matter of law; "[v]iewing the evidence in its totality, we conclude that there was sufficient proof for a reasonable jury to find that Raniola's abuse was so severe and pervasive as to constitute a hostile work environment in violation of Title VII"); *O'Shea v. Yellow Tech. Servs., Inc.*, 185 F.3d 1093, 1098 (10th Cir. 1999) ("the severity and pervasiveness evaluation is particularly unsuited for summary judgment because it is 'quintessentially a question of fact'"); *Bales v. Wal-Mart Stores, Inc.*, 143 F.3d 1103, 1109 (8th Cir. 1998) (affirming jury verdict for plaintiff on hostile work environment claim, concluding "there was substantial credible evidence to support the jury's finding of severity and pervasiveness"); *Beardsley v. Webb*, 30 F.3d 524, 530 (4th Cir. 1994) (upholding denial of defendant's motion for judgment as a matter of law, holding that whether "'harassment was sufficiently severe or pervasive is quintessentially a question of fact'" that rested on jury's determination of "the credibility of the witnesses and the inferences the jury could reasonably draw from the facts") (citation omitted). In contrast, the decision below affords no deference to the jury's finding, and thus ignores this Court's precedents.

B. Hostile Work Environment Claims are Particularly Suited to Jury Determinations

This Court has repeatedly "emphasized" that the existence of a hostile environment, and particularly the objective severity and pervasiveness of harassment, must be "judged from the perspective of a reasonable person in the plaintiff's position, considering 'all of the circumstances.'" *Oncale*, 523 U.S. at 81. *See also Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 270-71 (2001) ("whether an environment is sufficiently hostile or abusive must be judged by looking at all the circumstances") (citations omitted); *Harris*, 510 U.S. at

22 (same); *cf. Meritor*, 477 U.S. at 69 ("the trier of fact must determine the existence of sexual harassment in light of 'the record as a whole' and 'the totality of circumstances'") (citation omitted). These features of the sexual harassment determination—that the harassing conduct must be examined in light of the specific context in which it occurred, in light of all of the circumstances, and from the perspective of a "reasonable person" in the plaintiff's position—make it especially well-suited to a jury determination.

The totality of the circumstances inquiry is by its nature very fact intensive. As this Court acknowledged, "[t]his is not, and by its nature cannot be, a mathematically precise test." *Harris*, 510 U.S. at 22. Rather, it is "[c]ommon sense, and an appropriate sensitivity to social context" that "will enable courts and juries to distinguish between simple teasing ... and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive." *Oncale*, 523 U.S. at 82. Not only are juries well-equipped with "common sense" and "sensitivity to social context," but they also have the benefit of hearing all the evidence necessary to determine the "real social impact of workplace behavior," which, this Court has noted, "often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." *Id.* at 81-82.[8] Thus, it is appropriate for a jury to determine the predominantly fact-based issue of whether a hostile work environment was created. *See City of Monterey v. Del Monte Dunes at*

[8] The Eighth Circuit therefore erred by examining each incident of sexual harassment in isolation without considering the particular circumstances of Ms. Duncan's workplace context. *Duncan*, 300 F.3d at 935 (reducing Duncan's allegations to "four categories" of events and ignoring contextual facts).

Monterey, Ltd., 526 U.S. 687, 720 (1999) (fact issues in actions at law are generally province of jury).

Moreover, Congress has required that juries be selected from "a fair cross section of the community," 28 U.S.C. § 1861, in order "to reflect the community's sense of justice" in deciding cases. H.R. Rep. No. 90-1076 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1792, 1797, *quoted in Taylor v. Louisiana*, 419 U.S. 524, 529 n.7 (1975); *see also Theil v. Southern Pac. Co.*, 328 U.S. 217, 220 (1946). In the context of a hostile work environment sexual harassment case, the jury pool will include men and women familiar with contemporary workplace conduct and sexual norms.[9] *See* M. Isabel Medina, *A Matter of Fact: Hostile Environments and Summary Judgments*, 8 S. Cal. Rev. L. & Women's Stud. 311, 358 (1999) (juries possess "familiarity and direct involvement with workplace norms" and "a sense of workplace and community values critical to determining the fact issues posed by sexual harassment cases"). As such, a jury's view on what conduct is sufficiently severe and pervasive to create a hostile work environment is likely to approximate that of a "reasonable person."

Social science research shows a strong consistency in the types of behaviors individuals identify as sexually harassing. *See generally* Teresa M. Beiner, *Let the Jury*

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[9] There is reason to believe that the accuracy of a hostile work environment determination is enhanced by the presence of both men and women on the jury. *See* David N. Laband & Bernard F. Lentz, *The Effects of Sexual Harassment on Job Satisfaction, Earnings, and Turnover Among Female Lawyers*, 51 Indus. & Lab. Rel. Rev. 594 (1998) (noting difference in perceptions of male and female lawyers); Richard L. Wiener & Linda E. Hurt, *Social Sexual Conduct at Work: How Do Workers Know When It Is Harassment and When It Is Not?*, 34 Cal. W.L. Rev. 53, 66-67 (1997) ("empirical research supports the view that men and women workers hold divergent perspectives concerning what constitutes hostile work environment harassment").

Decide: The Gap Between What Judges and Reasonable People Believe is Sexually Harassing, 75 S. Cal. L. Rev. 791, 827-38 (2002) (reviewing literature). Interestingly, many of the behaviors commonly identified as harassing are present in this case. For example, in a widely accepted 1994 study of thousands of federal employees, the U.S. Merit Systems Protection Board found that the majority of employees believed that pressure for dates, suggestive looks and gestures, and sexual teasing and jokes constituted sexual harassment, and an even greater majority believed that "suggestive letters, calls, [and] materials" constituted harassment. *Id.* at 835 (citation omitted). Studies also show that the public considers similar factors to those identified by this Court in determining the severity of sexual harassment. *Compare Harris*, 510 U.S. at 23 (relevant factors to the determination of whether a hostile work environment was created include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance"), *with* Beiner, 75 S. Cal. L. Rev. at 837 (reviewing social science findings that, in determining severity of harassment, individuals consider frequency, intensity and duration of conduct, and whether the harassment is targeted at a particular individual).

Commentators have noted that "at present a decided gap exists between what judges consider to be harassment and what the 'common person' who has been identified and studied by social scientists considers to be harassment." *Id.* at 841. The average person recognizes more types of conduct as sexually harassing than many courts acknowledge. *Id.* at 795. There is no reason to believe that judges have a better grasp than juries on whether a reasonable person would find harassing conduct objectively severe. *See Gallagher v. Delaney*,

139 F.3d 338, 343 (2d Cir. 1998) ("[w]hatever the early life of a federal judge, she or he usually lives in a narrow segment of the enormously broad American socio-economic spectrum, generally lacking the current real-life experience required in interpreting subtle sexual dynamics of the workplace"). Accordingly, appellate courts should defer to the jury's predominantly factual determination as to whether conduct creates a hostile work environment.

IV. PERMITTING APPELLATE REDETERMINATION OF WHETHER HARASSMENT IS SEVERE OR PERVASIVE UNDERMINES THE SEVENTH AMENDMENT AND JUDICIAL ECONOMY

The Seventh Amendment prohibits "the indirect impairment of the right of trial by jury through judicial re-examination of factfindings of a jury." *Colgrove v. Battin, U.S. District Judge*, 413 U.S. 149, 152 n.6 (1973); U.S. Const. amend. VII ("no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law"). As Justice Scalia has observed, "the People of the several States" were "so fearful" of "the practice of federal appellate reexamination of facts found by a jury .... that they constitutionally prohibited it by means of the Seventh Amendment." *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 450 (1996) (Scalia, J., dissenting) (emphasis deleted).

The right to a jury trial is "at the heart of the Bill of Rights." Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 83 (1998). Thus, this Court has long held that "'[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.'" *Chauffeurs, Teamsters*

& Helpers, Local No. 391 v. Terry, 494 U.S. 558, 565 (1990) (quoting *Dimick* v. *Schiedt*, 293 U.S. 474, 486 (1935)) (additional citation omitted). Accordingly, this Court must closely examine the pattern of judicial usurpation of the jury trial right that is exemplified by the decision below.

In addition to undermining the Seventh Amendment, allowing courts to redetermine facts presented to juries is contrary to the efficient administration of justice. When a reviewing court re-examines the evidence in the record, it not only duplicates the work of the finder of fact, but also makes sexual harassment litigation needlessly time-consuming and expensive for the parties. As the Court noted in *Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985), after the parties "concentrate their energies and resources on persuading" the fact-finder of their account of the facts, "requiring them to persuade three more judges at the appellate level is requiring too much." *Cf.* Fed. R. Civ. Proc. 1 (the Federal Rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action").

CONCLUSION

For the foregoing reasons, as well as those stated in the Brief for Petitioner, this Court should grant the petition for a writ of *certiorari*.

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IN THE

Supreme Court of the United States

DIANA DUNCAN,

Petitioner,

v.

GENERAL MOTORS CORPORATION,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Eighth Circuit

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TABLE OF CONTENTS

ARGUMENT.....1

I. This Case Presents the Question of Whether and Under What Circumstances An Appellate Court May Substitute Its Assessment Regarding the Effect of Sexual Harassment Upon a Plaintiff's Work Environment For That of a Properly Instructed Jury.....1

II. General Motors' Invocation of Alternative Bases for the Result Reached By the Court of Appeals Should Not Preclude This Court From Considering the Issue Presented By the Petition.....6

CONCLUSION.....8

TABLE OF AUTHORITIES

Bennett v. Spear,
520 U.S. 154 (1997).....6,7

Gallagher v. Delaney,
139 F.2d 338 (2d Cir. 1998).....1

Harris v. Forklift Systems, Inc.,
510 U.S. 17 (1993).....1,2,3

Matsushita Electric Industrial Co., Ltd. v. Epstein,
516 U.S. 367 (1996).....7

Mendoza v. Borden, Inc.,
195 F.3d 1238 (11th Cir. 1999).....3

ARGUMENT

General Motors reduces Mrs. Duncan's argument to the proposition that "jury verdicts in discrimination cases are sacrosanct" and that those verdicts "should be insulated from appellate review." Resp't's Br. at 9, 11. Mrs. Duncan makes no such claim. She demonstrates that the Court of Appeals majority substituted its placement of the line between harassment that makes a work environment hostile and harassment that does not for that of a properly instructed jury. Mrs. Duncan asks this Court to determine whether that substitution usurped the fact-finding function of juries in Title VII sexual harassment cases.

General Motors recognizes that all sexual harassment cases are "intensely fact-specific." Resp't's Br. at 12. In the Civil Rights Act of 1991, Congress provided for jury trials in those cases. Whether behavior constitutes harassment is a question of fact reserved for the jury, not the judges. See Pet. at 8-12.

I. This Case Presents the Question Of Whether and Under What Circumstances An Appellate Court May Substitute Its Assessment Regarding the Effect of Sexual Harassment Upon a Plaintiff's Work Environment for That of a Properly Instructed Jury.

The determination of whether a work environment was hostile is fact-intensive and depends upon "looking at all the circumstances." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22-23 (1993). "[I]nterpreting [the] subtle sexual dynamics of the workplace" is peculiarly within the ken of jurors. *Gallagher v. Delaney*, 139 F.2d 338, 342 (2d Cir.

1998). It is reasonable to assume that Congress had that insight when it provided for jury trials in the Civil Rights Act of 1991. Justice Scalia noted in his separate opinion in *Harris* that Congress did not establish a bright-line test for identifying actionable workplace harassment. 510 U.S. at 24 (Scalia, J., concurring). That omission is at least a legislative signal, if not a mandate, that jurors are to be left alone to decide whether particular instances of sexual harassment resulted in a hostile work environment.

In his *Harris* concurrence Justice Scalia observed that the principal opinion would insure that "virtually unguided juries" make those determinations. *Id.* The respondent characterizes the concurring opinion as a lament of the standard for actionable sexual harassment articulated by the majority and suggests that the concurrence "certainly does not support" Mrs. Duncan's position. Resp't's Br. at 10-11. This was not a dissent: Justice Scalia recognized "the inherently vague statutory language" governing the identification of illegal sexual harassment and acknowledged that there was "no alternative" to the result that the Court had reached. 510 U.S. at 24-25. At the very least, the opinion highlights the absence of clarity about when a trial or appellate court may undo a jury's placement of the line separating mere offensive conduct from prohibited sexual harassment and replace it with its own.[1]

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[1] Judicial usurpation of the line-drawing function earmarked for juries in Title VII cases encroaches as well upon the prerogative of Congress:

> It is Congress that enacted Title VII. When we ignore the congressional mandate, as interpreted by the Supreme Court, we become most vulnerable to the charge that we, as members of the unelected federal judiciary, are usurping the legislative prerogative.

General Motors suggests that the Court of Appeals majority did not reweigh the evidence and complains that Mrs. Duncan "points to no specific credibility determinations, recalibration of evidence, or inference drawing by the Court of Appeals." Resp't's Br.at 11-12. That contention ignores this Court's recognition that the existence or non-existence of a hostile work environment is peculiarly dependent upon factual determinations. *Harris,* 510 U.S. at 22-23. It also is inconsonant with thoughtful consideration of the Court of Appeals majority's opinion.

The majority opinion is replete with conclusions necessarily based upon second-hand weighing of evidence and assessment of credibility, and Mrs. Duncan did identify such components of the opinion in her petition. Pet. at 11 n.6. The panel majority's treatment of evidence regarding the net effect of harassment suffered by Mrs. Duncan is illustrative. The opinion notes that Mrs. Duncan was "disturbed" by her functional supervisor's "boorish advances and . . . behavior" but concludes that she failed to demonstrate "that these occurrences in the aggregate were so severe and extreme that a reasonable person would find . . . the terms or conditions of [her] employment had been altered." Pet. at 9a.

The panel could not have reached its conclusion without reweighing Mrs. Duncan's testimony about the effect that the harassment had upon her.[2] She said: "There

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Mendoza v. Borden, Inc., 195 F.3d 1238, 1269 (11th Cir. 1999) (Tjoflat, J., concurring and dissenting). Judge Tjoflat noted Justice Scalia's concurrence in *Harris* and observed, as Justice Scalia had implied, that "the solution lies with Congress and not the Third Branch." *Id.*

[2] No evidence suggested that Mrs. Duncan was an especially sensitive or emotionally weak individual.

were good days and bad days . . . . On a good day I could smile." (Tr. at 319.) She described the bad days: "There were days when I would leave crying. There were days I would be throwing up. I had diarrhea. I couldn't sleep. There were mornings I didn't even want to get up and come in." (Tr. at 320.) Mrs. Duncan was asked about the frequency of the bad days, and she replied: "There are times it could have been every day for a week. [There] were times there may have been two or three weeks where nothing happened. But once he started, he didn't stop." (Tr. at 321.) She added: "There were nights I couldn't even do my kids' homework with them. I couldn't cook dinner. I would be too upset. All I wanted to do was go home and go to bed." (Tr. at 320.) And she explained the consequences that persisted until the time of trial:

> I take great pride in any job I do. I am a good mother. I second-guess everything I do now, even up to today. If my current boss tells me I have done well, I—I feel like I should have done more . . . I don't have any self-esteem. I lost a lot of my pride. I am embarrassed I didn't stand up for myself sooner, that I was afraid.

(Tr. at 320.)

The District Court instructed the jury that it could return a verdict in favor of Mrs. Duncan only if it found that she had been subjected to sexual harassment "sufficiently severe or pervasive that a reasonable person in [her] position would find [her] work environment hostile." (Tr. at 1100-01.) The jury made that finding. (App. at 288-89.) The Court of Appeals majority replaced the jury's determination with its own.

Nor is it reasonable for General Motors to suggest that inference-tampering is hard to find in the majority opinion. Judge Arnold's dissent points out liberties taken in that regard:

> Mrs. Duncan was subjected to a sexual advance by her supervisor within days of beginning her job. This proposition occurred during work hours and was a direct request for a sexual relationship. The Court characterizes this incident as a "single request" . . . This description minimizes the effect of the sexual advance on Ms. Duncan's working conditions. During the months immediately following this incident, Mr. Booth became hostile to Ms. Duncan, increased his criticism of her work, and degraded her professional capabilities in front of her peers. Significantly, there is no suggestion that this hostile behavior occurred *before* Ms. Duncan refused his request for sex. From this evidence, a jury could easily draw the inference that Mr. Booth changed his attitude about Ms. Duncan's work because she rejected his sexual advance.

Pet. at 14a (emphasis in original). Of course Judge Arnold's observation also suggests the majority's recalibration of evidence and reassessment of credibility.

General Motors argues that "appellate scrutiny" of verdicts in favor of plaintiffs in sexual harassment cases is essential to police "the often-thin line" between mere rudeness and actionable discrimination. Resp't's Br. at 13. Mrs. Duncan seeks this Court's review precisely because of the indistinctness of the line, the factual nature of the inquiry

required to draw it in a given case, and the tendency of appellate judges to substitute their notions for those of juries. General Motors recognizes that sexual harassment cases are "intensely fact-specific" but fails to acknowledge the critical role that Congress assigned to juries in those cases. Resp't's Br. at 12.

General Motors contends that appellate court intervention in the characterization of harassing conduct as merely offensive or illegally discriminatory "is necessary to provide as much balance and legal oversight as possible." *Id.* As the plethora of irreconcilable appellate court decisions cited in Mrs. Duncan's petition attest, the Courts of Appeals have not come close to establishing a comprehensible standard for distinguishing between conduct that is only boorish and that which renders a workplace hostile. Pet. at 13-16.

II. General Motors' Invocation of Alternative Bases for the Result Reached By the Court of Appeals Should Not Preclude This Court From Considering the Issue Presented By the Petition.

General Motors urges this Court to refuse to review this case on the basis of issues that the respondent raised in the Court of Appeals and that were not decided by that court. Brief in Opposition at 14-15. It contends that those claims were "sufficient bases" for the result reached by the Court of Appeals majority and that this Court therefore should not grant the writ requested by Mrs. Duncan. *Id.* Although General Motors will be free to defend the judgment of the Court of Appeals "on any ground supported by the record" if review is granted, *Bennett v. Spear*, 520 U.S. 154, 166-67 (1997), the presence of arguments unreached by that court should not preclude this Court from considering the issue that proved dispositive. *See* Sup. Ct. R. 10 (noting the

Court's discretion with respect to review by certiorari and the requirement of "compelling reasons" for such review, and including the dubious resolution of an important question of federal law as such a reason); *see also Matsushita Electric Industrial Co., Ltd. v. Epstein*, 516 U.S. 367, 379 n.5 (1996) (noting that the Court need not address a claim "outside the scope of the question presented").[3]

The present Court of Appeals decision inevitably will chill the assertion of claims by women subjected to sexual harassment in their workplaces. The willingness of individuals who have been victimized by sexual harassment on their jobs to take on the economic, social, and emotional costs of pursuing their claims in court surely will be diminished if the daunting achievement of having obtained a jury's verdict can be undone by a majority of three appellate judges at liberty to reweigh and reinterpret the evidence that correctly instructed jurors found persuasive. The opinion of the Court of Appeals majority is likely to thwart the Title VII legislation. That opinion invites the substitution of appellate court fact-finding for congressionally mandated jury fact-finding. Those are "compelling reasons" for review by this Court. The fact that other issues may remain to be resolved in this Court or on remand has no bearing on the importance

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[3] Mrs. Duncan concedes nothing with regard to either of the ghost issues invoked by the respondent. She prevailed on both issues in the District Court and briefed and argued both as appellee in the Court of Appeals. The Court of Appeals majority found neither of those theories sufficiently compelling to warrant inclusion in its opinion. Judge Arnold surely would have refrained from dissenting and concurred, separately or not, if he found either issue adequate to support the result reached by the majority. This Court may elect to address those issues or leave them for disposition on remand. *Bennett*, 520 U.S. at 166-67. But generally the Court "do[es] not address arguments that were not the basis for the decision below." *Matsushita*, 516 U.S. at 379 n.5.

of the question presented in Mrs. Duncan's petition for a writ of certiorari.

CONCLUSION

For the reasons set forth in the petition for a writ of certiorari and in this reply brief, the petition should be granted.

Respectfully submitted,

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